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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 KATHRYN TOWNSEND GRIFFIN, *et*
4 *al.*,

Plaintiffs,

5 v.

17 Civ. 5221 (LLS)

6 EDWARD CHRISTOPHER SHEERAN,
7 personally known as Ed
8 Sheeran, *et al.*,

Defendants.

9 -----x

10 New York, N.Y.
11 May 3, 2023
12 11:05 a.m.

13 Before:

14 HON. LOUIS L. STANTON,

15 District Judge
16 - and a Jury -

17 APPEARANCES

18 FRANK & ASSOCIATES PC
19 BY: PATRICK RYAN FRANK
20 KEISHA RICE
21 KATHERINE VIKER
22 - and -

BEN CRUMP LAW
21 BY: BEN CRUMP
22 Attorneys for Plaintiffs

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25 BY: ILENE SUSAN FARKAS
DONALD S. ZAKARIN
ANDREW MARK GOLDSMITH
BRIAN MAIDA

N53HGril Ferrara - Cross

(Trial resumed; jury present)

THE COURT: Morning, members of the jury.

Doctor. And you're still under oath, doctor. You're reminded.

THE WITNESS: Thank you, your Honor.

LAWRENCE FERRARA Ph.D., resumed.

MR. FRANK: May it please the Court.

CROSS-EXAMINATION CONTINUED

BY MR. FRANK:

Q. Good afternoon, Dr. Ferrara.

A. Good morning.

Q. Thank you very much for coming back this morning.

A. Thank you.

Q. I wanted to pick up where we left off yesterday, I believe. I wanted to ask you a little about your methodology as far as how you went about doing the analysis of the two songs at issue. Could you walk us through that.

A. Yes. As I testified yesterday, I begin by working through both works in their entirety, in this case, the deposit copy of LGO and the sound recording. I then transcribe the music and lyrics in the sound recording in the method — rather, deliberate and slow systematic method. Once those transcriptions are completed, I then complete a comparative analysis of the sheet music, which is the deposit copy of LGO, and what is now the written transcription of the notation and

N53HGril Ferrara - Cross

1 the lyrics in my transcriptions. And I do a detailed analysis
2 of that. That analysis includes an analysis, as I testified
3 yesterday, of the five fundamental elements, certainly the
4 structure, the harmony, the rhythm, the melody, the lyrics. I
5 certainly look at other less fundamental elements like key and
6 meter, and so forth, but that overall process is the
7 methodology that I use.

8 Q. Thank you.

9 I wanted to see if we could zoom in on the
10 transcription process. I think you mentioned yesterday you
11 used some kind of software to do that?

12 A. Yes.

13 Q. Could you describe that?

14 A. Of course. I mentioned that there are any number of what's
15 called media player softwares. In fact, there's a Windows
16 Media Player and there is QuickTime Apple media player. I also
17 have Audacity, which is a software. Those media players
18 essentially, you know, instead of putting your audio into,
19 let's say, iTunes and playing it back, you put it into the
20 media player, and you can play it just as it is. But it also
21 allows you to zoom in and to take a small section — it can
22 literally be a section that constitutes five or six notes of
23 the melody — and loop it, that is, play it over and over and
24 over again.

25 That allows me, then, to begin to match at the piano,

N53HGril Ferrara - Cross

1 to write down what I believe I'm hearing, go back and forth.

2 And I literally do that section by section, and the media
3 player software allows me to do that systematically.

4 Q. Forgive me, I'm probably not as technologically adept as
5 you are, doctor, but does the program operate by you playing,
6 for instance, "Thinking Out Loud" aloud and then it translates
7 it into musical notation?

8 A. No.

9 Q. How does it work?

10 A. Well, let's not confuse. The media player is what allows
11 me to zoom in on the audio, in this case that would be the
12 audio of TOL, because we're talking about my transcription of
13 TOL. I didn't have to transcribe into musical notation LGO,
14 because that's the deposit copy. So we're only talking about
15 the transcription of TOL, and that is where the media player
16 comes into place.

17 I think what you're talking about is a different
18 process altogether, and that is, after I have put into the
19 software — and the software that I use is used by many, if not
20 most, is called Sibelius. It is a notation system so that you
21 literally write in into the — and you can play on a keyboard,
22 but you get every note, every rest, every chord, every lyric.
23 It writes right into the software.

24 And then what it does, instead of having something
25 that I would write on manuscript paper, which would be

N53HGril Ferrara - Cross

1 handwritten, it gives you a published look. So it's a lot
2 easier. The transcriptions that you saw yesterday were
3 Sibelius, that is, my input, my content, but they made it into
4 a form so that you could actually see the notes in a clearer
5 way.

6 That Sibelius software also has a MIDI file use, and I
7 believe Dr. Stewart testified that he used that in creating his
8 own audios. So what you can do is, once you have completed
9 that transcription and written notation, in this case of the
10 melody, let's say, in TOL, you can then have the Sibelius
11 software create what's called a MIDI file, which is an audio
12 file, and you can play it back. And once again, based on my
13 reading of the testimony of Dr. Stewart from last week, that's
14 what he did to create some of the audio in his slides.

15 Q. Sure. Thank you for that.

16 I guess what I'm trying to get to, Dr. Ferrara, is
17 whether there was any point in time where you sat in a room and
18 listened to the music of "Thinking Out Loud" and actually
19 manually translated it into musical notation?

20 A. Yes. First I went through several listenings, many
21 listenings of "Thinking Out Loud" in its entirety; and in each
22 of those moments, when, for example, if I'm listening to a
23 three-second loop, that is, digitally enacted repeat of those
24 three seconds of TOL, I'm listening to the TOL sound recording
25 piece by piece by piece over and over again. So all of that

N53HGril Ferrara - Cross

1 transcription is informed by the TOL sound recording, of
2 course.

3 Q. OK. When you're sitting there listening to the loop, are
4 you typing into a computer, the transcription, or are you doing
5 it manually?

6 A. Oh, no, what I just testified before, that you use your
7 keyboards to the computer to type in an A, a B, to type in an A
8 that is a quarter note, a B that is a half note, and so forth.
9 So all of that is done through the computer. And again, it's
10 informed by my listening and matching and literally creating a
11 transcript that, in my opinion, represents, in this case, the
12 melody, the harmony, and the lyrics of the portions at issue in
13 TOL.

14 Q. OK. I think I understand now. Thank you, doctor.

15 Did anyone else assist you in this process of
16 transcribing "Thinking Out Loud"?

17 A. No.

18 Q. And I believe you represented that what we saw, the
19 transcription in your presentation, was actually the product of
20 the software deriving from the input that you put into the
21 computer, correct?

22 A. It is a product of the use of the software which represents
23 my notation, that is, my transcription, yes.

24 Q. Doctor, are you familiar with the prevalence of — in
25 popular music of the last several decades of guitar-themed

N53HGril Ferrara - Cross

1 music? You might call it the heavy use of riffs or hooks. Do
2 you know what a riff is?

3 A. I do know what a riff is.

4 Q. Can you define what a riff is?

5 A. A riff is a musical passage. For example (piano played),
6 that's a riff. That's a riff on a blues scale.

7 Q. What would you call a hook? How would you describe that,
8 if you know?

9 A. Yeah, a hook is different from a riff. A riff could be a
10 hook. A hook is generally defined as the most memorable part
11 of the song. And in the business, "hook" is often interchanged
12 with "chorus." Very often in the business someone will say
13 play the hook, and they will mean play the chorus; play the
14 chorus, and they mean play the hook. Most of the time,
15 certainly not always, most of the time, the hook, i.e., the most
16 memorable part of the song, is in the chorus.

17 Q. In your experience, are hooks often repeated in popular
18 music?

19 A. Are hooks often with —

20 Q. Hooks that you mentioned, the memorable part, are they
21 often repeated?

22 A. Oh, repeated?

23 Q. Yeah.

24 A. Yes.

25 Q. In a particular song.

N53HGril Ferrara - Cross

1 A. Indeed. The chorus generally is the portion of a song that
2 is repeated. It can be iterated, that is, a number of times,
3 two times, three times. There could be chorus one, two, and
4 three. In so doing, the chorus is repeated to the extent that
5 the hook is part of the chorus. The hook is being repeated in
6 the chorus.

7 Q. The opening salvo of, for instance, "Satisfaction" by The
8 Rolling Stones —

9 A. (Vocalizing).

10 Q. — those ubiquitous open notes, would you call that a
11 guitar hook or a theme?

12 A. That's a good point. The hook of "(I Can't Get No)
13 Satisfaction," is *I can't get no* — it's literally the title.
14 You don't want me to sing. It's the title of the song, "(I
15 Can't Get No) Satisfaction," and that melody to which it is
16 set, that's the hook of the song. I don't think anybody
17 disputes that.

18 On the other hand, there are songs like that that have
19 what's called the instrumental hook, so (vocalizing). That's
20 an instrumental hook, to be sure. It's certainly one of the
21 memorable moments of the song.

22 Q. You call that an instrumental hook?

23 A. Yes.

24 Q. "Deep Purple," "Smoke on the Water," the open chorus --

25 A. (Piano playing) Yeah.

N53HGril Ferrara - Cross

1 Q. Would you call that an instrumental hook?

2 A. Yes.

3 Q. Doctor, if you could, what are the chords at issue for
4 "Thinking Out Loud"? What are the chords in the main verse?

5 A. Sure. In "Thinking Out Loud," we have the D chord. That's
6 a I chord, also the letter D, D major. The next chord is
7 another D chord but with the lowest note as F sharp, and that
8 is, of course, the uppercase Roman numeral I/3. The next chord
9 is G, and that's a IV chord. And the next chord is A, and that
10 is a V chord. That's the basic chord progression. Remember,
11 there are multiple chord progressions in TOL, and we've just
12 basically boiled that down to a basic chord progression to
13 facilitate the comparison.

14 Q. Is it fair to say that that chord progression that you just
15 identified and played for us is probably the most repeated
16 element of "Thinking Out Loud"?

17 A. Well, actually not.

18 Q. It's not?

19 A. No, because that basic chord progression is — is iterated.
20 It certainly is iterated in certain moments in the song. But
21 you'll all recall, because you saw it twice, Dr. Stewart showed
22 and I showed again yesterday, my chart of similar chord
23 progressions, and I only listed five of them, saying these are
24 five similar chord progressions in TOL that have similarity to
25 the chord progression in LGO. And so those other chord

N53HGril Ferrara - Cross

1 progressions are also sounding at times, and so the number of
2 repeats of the actual I-iii-IV-V chord progression is not
3 throughout the song.

4 Q. But it goes throughout the two main verses, correct?

5 A. No. In fact, as you can see if you have the sheet music —
6 and I agree with the chords in the sheet music — just look at
7 the first eight bars, which is verse 1A, just look at that, and
8 maybe there's one iteration of that chord progression, maybe
9 not even.

10 Q. That chord progression is the chord progression that opens
11 the song, though, correct?

12 A. No, the chord progression —

13 Q. It's not?

14 A. — that opens the song is a D5, not a D. That's D. This
15 is a D5. This is wonderful opening that's kind of expansive
16 because it doesn't tell you whether it's major or minor. It
17 just kind of opens it up. But it makes D the moment. That is
18 what goes on.

19 Then in the next chord change, we have two notes, F
20 sharp and A (piano played). And within the context of that
21 (piano played) D, that creates a D chord but with F sharp as
22 the lowest note and also within the context (piano played) of
23 what's going on in the vocal melody and, of course, backed up
24 by the fact that thereafter it's always the D chord with F
25 sharp in the bass.

N53HGril Ferrara - Cross

1 By the way, the next chord is not a G major chord,
2 which is part of the bass, a chord progression, that's this.
3 (piano played). The next chord in the first iteration of the
4 chord progression that's played by Ed Sheeran on the guitar is
5 a G5 chord. Remember I said the first chord was D5 because it
6 didn't have the — didn't have the third of the chord? Well,
7 the third chord is a G5 chord. That doesn't have the full
8 third. And then we have — instead of an A chord, what we
9 actually have is an A sus 2, which is this (piano played). And
10 what's happened is the C sharp, which is the third, has been
11 suspended, and we're using the second instead.

12 So the direct answer to your question is absolutely
13 not. The I-iii-IV-V chord progression, which for the purposes
14 of analysis we've been calling the basic chord progression,
15 Dr. Stewart uses the same terminology, that's the bass chord
16 progression. That's not what opens TOL.

17 Q. I understand.

18 I'm a little bit confused, though, Dr. Ferrara,
19 because I believe you testified yesterday that there was a D
20 note, a D root note in the second —

21 A. I'm sorry, your voice dropped off.

22 Q. I believe you testified yesterday you were asked about
23 Mr. Sheeran's prior testimony regarding the opening 24 seconds.
24 Mr. Sheeran represented that there was a D note in the second
25 chord of the opening 24 seconds. You testified that he was

N53HGril Ferrara - Cross

1 right, but just said it was an F and an A chord. So I don't
2 understand the inconsistency there. Could you explain that.

3 MS. FARKAS: Objection, mischaracterizes the
4 testimony.

5 MR. FRANK: I'll withdraw it. I'll ask a better
6 question.

7 Q. Dr. Ferrara, so can you just reiterate what the opening
8 chords are for — what the actual chords are for the opening
9 sequence?

10 A. Yes, of course. So the opening chord is D5, the next chord
11 is an F sharp as the lowest note D chord, then we have a G5,
12 and then we have an A sus. And that is consistent with my
13 testimony yesterday, by the way.

14 Q. When you say "A sus" or "D5," those are variations on the
15 bass chord of a D major, is that correct?

16 A. That — you're confusing terms.

17 Q. OK. A D7, for instance, you just said is a D major chord
18 adding in a 7, is that correct?

19 A. D7 is this, yes, (piano played). Right.

20 Q. So you're building on the bass chord, is that correct?

21 A. You're — unfortunately, you're confusing a couple of
22 musical terms, so it's difficult to answer your question.

23 Q. Well, let me ask you this: When you add a seventh or A sus
24 or G5, the root note is a G, correct, or D, and that's the bass
25 note that determines what the chord is, and then there are

N53HGril Ferrara - Cross

1 variations or permutations of the chord, correct?

2 A. Well, a lot to unpack there.

3 The name of the chord is the root of the chord, and so
4 the root of the D chord is D. And certainly, on that chord you
5 could leave out the third, as Ed Sheeran does at the opening of
6 the song with this wonderful just kind of openness because of
7 the perfect fifth. That's called a perfect fifth. It's a D5
8 chord (piano played). But you're quite right, Mr. Sheeran
9 could have added a very, very different modality, but he could
10 have started with a D7 chord, in which case, as you pointed out
11 correctly, the root would still be D.

12 But there's quite a bit of difference. To simply call
13 this a variant of this (piano played) is pretty dramatic. Had
14 the opening been this (piano played), I just can't imagine the
15 opening melody in "Thinking Out Loud" against a D7 chord.

16 Q. I think you testified, if I understand correctly, the
17 pattern in "Thinking Out Loud" for the verse that we were
18 discussing earlier, the four-chord pattern, is D-D/F sharp, is
19 that the proper way to call it, that chord?

20 A. Sure.

21 Q. G major and, is it, A, the last chord?

22 A. An A. That's the basic chord progression for the purposes
23 of analysis, otherwise every passage that would be compared,
24 we'd have to be comparing this version of a four-chord
25 progression with an A sus or this with an A11 or this with an

N53HGril Ferrara - Cross

1 open fifth. And that's why we do that, for the purposes of
2 comparison, not failing to remember that, based on the initial
3 question that brought us into this line of questions, that the
4 answer is, no, it doesn't start with that (piano played).

5 There are many versions of chord progressions that, agreeably,
6 are similar to the chord progression in LGO but not as similar
7 as the basic chord progression (piano played) in TOL is.

8 Q. I see. Thank you.

9 So we're on the same page, the chords are D, D/F
10 sharp, G and A, is that correct?

11 A. D is the first chord, the second chord is D with F sharp as
12 the lowest note, G and A.

13 Q. For purposes of — do you play guitar?

14 A. I can't even say that I play. I played instantly when I
15 was a kid, but I went to bass.

16 Q. Isn't on the guitar, which is what Mr. Sheeran is playing
17 on the song, isn't the guitar D/F chord? It's a D major chord
18 with another finger on the root note for the F sharp, is that
19 correct?

20 A. Well, I can't say how Mr. Sheeran performed it on the
21 guitar.

22 Q. But that's how it's formed, though, the chord, you're
23 playing an F sharp with a D chord?

24 A. What I — well, the F sharp and the A is part of the D
25 chord, not with a D chord. It's part of the D chord. It's not

N53HGril Ferrara - Cross

1 two separate things.

2 So what I can testify to, and certainly what I base my
3 analysis on, was the transcription of what he actually played.
4 That's what musicologists do.

5 Q. I understand.

6 But in the second chord, there's a root note above an
7 F sharp, is there not?

8 A. That is not a root note of an F sharp. It's a simply wrong
9 statement.

10 Q. There's no F sharp in that chord?

11 A. You said there's a root note.

12 Q. My apologies. Where does the F sharp fall?

13 A. The F sharp is the lowest note of the D chord which is the
14 second chord. We call it I/3. And the reason we label it I/3
15 is because the F sharp is the lowest chord. That also can be
16 written as a D chord/F sharp. And you may recall that
17 yesterday I showed Dr. Stewart's original report, Example 3,
18 that did exactly that. Dr. Stewart initially said this is a
19 D/F sharp chord.

20 Q. And the F sharp is the lowest note, you said?

21 A. The F sharp is the lowest note, but it is not the root.

22 Q. So we have D, D/F sharp chord, G and the A for TOL. What
23 are the chord for L — "Let's Get it On," after you've
24 transposed them?

25 A. Yes, that's important, as I transposed them and Dr. Stewart

N53HGril Ferrara - Cross

1 transposed them. So the basic — let's say the chord
2 progression first is a I chord — and here we have full chords
3 because that's what Ed Townsend wrote into the score.

4 Q. I appreciate that. You can just tell me what the chords
5 are. You don't need to play them at this point.

6 A. Oh, OK.

7 Q. I appreciate the offer, though.

8 A. Absolutely.

9 In the key of D, we have a D chord, I, then we have an
10 F sharp minor chord, iii, then we have a G major chord,
11 uppercase Roman numeral IV; and then we have a V with an Arabic
12 number 7, and that, of course, is in this key of D an A7 chord.

13 Q. So the only chord, the difference between the two sequences
14 that we've talked about, is the second chord is a D/F sharp as
15 opposed to in "Let's Get it On" it's an F sharp, is that
16 correct?

17 A. And the other difference is the 7 on the V chord. Once
18 again, when we reduce that to the basic chord progression that
19 both Dr. Stewart and I did, look, the basic chord progression
20 in "Let's Get it On" is I-iii-IV-V, so there is no 7. So if
21 that were the case, then the answer would be yes. With respect
22 to the actual deposit copy, the answer would be no. There's
23 also the difference of the seventh on the V chord which is not
24 the case in TOL.

25 Q. Do you attach any type of musicological significance to —

N53HGril Ferrara - Cross

1 well, let me back up.

2 For purposes of the record, when you say the "fifth
3 chord," I believe you're talking about the A, the final chord?

4 A. V chord.

5 Q. When you say that that's an "A7," from a musicological
6 standpoint, do you attach any significance to that?

7 A. Well, an A7 chord is not the same as an A chord. That's
8 A7. That's A (piano played) but --

9 Q. I guess the question was, is there an appreciable
10 difference in your mind?

11 A. So the point is it depends from what — it depends —
12 musicologically it depends on what is at issue in the analysis.
13 If we're talking about the function of that chord, and I'm not
14 going to get into esoterics right now, that chord has a
15 different function with a 7 on it than it has without the 7.
16 That would be musicologically significant.

17 Within the context of this case and the reason why
18 both Dr. Stewart and I said, look, the basic chord progression
19 doesn't include the 7 is, no, it wouldn't be a significant
20 difference. It wouldn't be a significant difference to the V
21 chord in TOL and the V7 chord. It's a difference, but within
22 the context of what we're looking for, not the function
23 necessarily of that V7 chord. It's not huge, but it is a
24 difference.

25 Q. In your experience, is it uncommon for guitar players to,

N53HGril Ferrara - Cross

1 when they're playing, add that to add a little flavor to it, a
2 seventh, give it a bluesy feel?

3 A. I think that's a little bit too loose for me to hypothesize
4 on what guitar players do.

5 Q. OK. Dr. Ferrara, you talked quite a bit about prior art
6 yesterday, and I wanted to see if we could delve into that.

7 First, did you conduct the prior art search by
8 yourself?

9 A. Yes.

10 Q. And I think you said you had some encyclopedias. Were
11 those your source materials?

12 A. No.

13 Q. I might have heard it wrong. Can you tell me what you
14 looked to.

15 A. The only time I think I used "encyclopedia" was an entry I
16 wrote, a co-authored for an encyclopedia.

17 No, there are chord books like chord method books — I
18 showed you some yesterday — that have chord progressions, and
19 so there was a chord method book of popular songs, *Money*
20 *Chords, Popular Songs, Popular Chord Progressions* by Richard
21 Scott, and therein there are any number of chord progressions
22 that, according to that author, are popular in music — popular
23 music. And I pointed to with one of my arrows the identical
24 chord progression in "Let's Get it On" in that book and noted
25 other portions of the book.

N53HGril Ferrara - Cross

1 There was that second book for — *Advanced Beginner*,
2 advanced beginner guitar students, and in that book, they also
3 — on two separate pages I had arrows that listed the LGO. So
4 I used those books, for example, and other books.

5 One of the things about books for chord progressions
6 is there are thematic indices, indexes of themes, that are
7 online for melodies but not for chords. So — then I also went
8 to sheet music that I have, just kind of eyeballing and finding
9 things.

10 Q. Thank you for that.

11 Did you find the songs that you listed, did you find
12 them in these chord books or did you go elsewhere to get them?

13 A. Well, some of the songs that are listed in — are in books.
14 For example, the Mary Wells "You Lost the Sweetest Boy" that
15 was in 1963 prior art, I found that in a — I think it's an
16 R & B big book. It's called a lead sheet book, and this —
17 there are couple hundred songs in there. And leafing through,
18 literally, bang, there it was in E flat major. So that's how I
19 found the Mary Wells song. So it's a mix.

20 Q. When you conduct your prior art research or within the
21 context of the prior art analysis, can you explain, because I
22 don't think it's been explained to date, what prior art is and
23 why you're looking for it.

24 A. Of course. The prior art that I did, for example, the
25 prior art that I completed post my, what's called, Rule 26

N53HGril Ferrara - Cross

1 report, that prior art was meant to supplement and provide
2 support for the findings in that Rule 26 report, and
3 importantly, my conclusions today are the same as in that
4 Rule 26 report.

5 So the purpose of that prior art was to supplement the
6 findings. And the findings were that (1) there simply are not
7 any significant similarities at all between the two songs. And
8 furthermore, for argument sake, let's say that with respect to
9 the combination of the chord progression and the pop, pop, pop,
10 pop, the anticipation rhythm, the prior art will establish or
11 not establish, it does in this case, that in fact before LGO
12 there were any number of songs that had that combination of
13 those two songs.

14 So that informs me so that I have literally an
15 informed opinion and can say honestly that, no, I don't — in
16 fact, I have found objectively that LGO was not the first to
17 use this combination; that it was used before. And so the
18 purpose of the prior art search is to find out whether that's
19 the case or not, and sometimes it is not the case.

20 Q. So if I understand you correctly, doctor, you're saying
21 that the purpose of looking for the prior art is to determine
22 whether or not the alleged infringed-upon work was original at
23 the time it was made?

24 A. I don't necessarily use the word "original" because it has
25 a legal connotation.

N53HGril Ferrara - Cross

1 Q. Creative or novel or new?

2 A. No, whether it was the first, that's one of the things.

3 Q. OK.

4 A. And the point is did other writers put this combination
5 together before LGO? It's not a matter of whether it was
6 original or not. Did they? And the answer in this case is
7 yes, they did, and I demonstrated that, I think yesterday.

8 Q. You used the words "whether it was the first," and that
9 brings me to my next question. What is the relevance of the 80
10 songs, some-odd songs, that you've cited that came after LGO?

11 A. That's a misstatement.

12 Q. There aren't many songs you listed after LGO?

13 A. Yeah, so —

14 Q. Why would you list those? We're talking about prior art,
15 correct? Those aren't prior art, are they?

16 A. They are. Thirty-three of --

17 Q. They are?

18 A. I divided in my testimony the 80 songs that include the
19 basic chord progression in LGO; 80 songs, basic chord
20 progression, LGO. And I noted in my testimony that 33 of them
21 predate LGO. I also noted in my testimony that 47, the
22 remaining 47 of those 80, were created and released after LGO
23 but before TOL.

24 That's significant for two reasons: First, with
25 respect to the 33, I also testified that, I believe, that if I

N53HGril Ferrara - Cross

1 were to continue a prior art search, I'd find more. But let's
2 say that there's only 33. Well, that makes LGO the 34th song
3 to use this combination. If I found more, it might be the 37th
4 or the 38th or the 49th. That's the reason for those 33. They
5 are significant for that reason.

6 Now, with respect to the remaining 47, these were
7 songs also that embody this commonplace combination of two
8 fundamental musical building blocks, the I-iii-IV-V chord
9 progression and anticipation on the second and fourth. Those
10 47 songs do that as well.

11 Why is that important? To answer your question
12 directly, it's important because, in any case, the writers of
13 TOL could know any number of those 80 songs, and who is to say
14 that if you really believe they copied something, that they
15 didn't copy one of the other songs? When you have that many
16 songs, it undermines the claim of copying, that they copied a
17 particular song in those 80.

18 Q. So you're suggesting the assertion of the citation to the
19 other songs —

20 A. I'm sorry, you're speaking away from the mic. This is a
21 dead spot with the —

22 Q. I apologize.

23 A. Yeah.

24 Q. So you're suggesting that the existence of other songs
25 postdating LGO are indicia of the prospect of Mr. Sheeran

N53HGril Ferrara - Cross

1 having plagiarized another song?

2 A. No.

3 MS. FARKAS: Objection.

4 Q. Is that what you're saying?

5 THE COURT: Well, the question is, is that what you
6 said, doctor? I think he'd like him to answer.

7 THE WITNESS: Your Honor —

8 MS. FARKAS: It's just argumentative, your Honor.

9 THE COURT: Yes, but that's not — there's a good deal
10 of prior art about that in this case.

11 THE WITNESS: With your permission, may I get a cup of
12 water?

13 THE COURT: Help yourself.

14 THE WITNESS: I appreciate it. Thank you, your Honor.

15 BY MR. FRANK:

16 Q. And if you're more comfortable, Dr. Ferrara, I don't think
17 we'll need you to play keyboard anymore. If you'd like to be
18 on the stand, if that's more comfortable —

19 A. If that's what you'd prefer, yes.

20 Q. It's your preference, whatever you prefer.

21 A. Are you planning on projecting anything?

22 Q. No.

23 A. Yes.

24 THE COURT: I think there's a pending question.

25 THE WITNESS: Thank you.

N53HGril Ferrara - Cross

1 BY MR. FRANK:

2 Q. Do you remember the question?

3 A. Do I remember?

4 Q. The pending question?

5 A. No.

6 Q. OK. I'll repeat it.

7 You cited music that postdates "Let's Get it On," and
8 my understanding of what you just said is that it suggests —
9 it's indicia of the prospect of Mr. Sheeran plagiarizing
10 another song as opposed to "Let's Get it On." Do I understand
11 that correctly?

12 A. No, that mischaracterizes exactly what I said. In fact,
13 it's just the opposite. The point is with not only the 33
14 songs that predate LGO but an additional 47, that undermines
15 the prospect that the writers of TOL copied any particular
16 song. And so, you know, the idea of plagiarism is, I think, a
17 distraction here. We're talking about copying, and I really do
18 not believe there is copying going on here because of the
19 unremarkable combination of these two elements that existed in
20 80 songs before TOL. That's what the indication is.

21 Q. With respect to prior art, you understand, Dr. Ferrara,
22 that even if prior art does exist to thinking — I'm sorry,
23 "Let's Get it On," there still has to be a demonstration that
24 Mr. Townsend was actually aware of that prior art. You
25 understand that, correct?

N53HGril Ferrara - Cross

1 MS. FARKAS: Objection. I think he's misstating the
2 law to this witness.

3 THE COURT: Sustained.

4 Q. Dr. Ferrara, as you sit here — well, let me ask you this:
5 Presumably, you weren't in the room when Ed Townsend wrote
6 "Let's Get it On," did you?

7 A. Of course not.

8 Q. Were you aware of who Ed Townsend was before you engaged in
9 this case?

10 A. Yes.

11 Q. You were.

12 Yesterday you showed a book that seemed to suggest
13 that Marvin Gaye wrote "Let's Get it On." You remember that?

14 A. Well, let me answer that in two parts. First, I remember
15 the book, and secondly, you've mischaracterized what the author
16 of that book wrote.

17 The author of that book wrote, very specifically, I do
18 not believe that Marvin Gaye, thinking — you know, that it was
19 Marvin Gaye who wrote the song alone and not with Ed Townsend,
20 but I do not think that author wrote that Marvin Gaye
21 plagiarized or copied any of the many songs that predate LGO.
22 He started with — there are many songs that predate LGO, but I
23 do not — and this is what I testified to — I do not think
24 that Marvin Gaye copied any of those songs because it's so
25 common. So your characterization is a complete

N53HGril Ferrara - Cross

1 mischaracterization. That's not what I said.

2 Q. What I'm trying to understand is whether or not you
3 understand that it's Ed Townsend who wrote "Let's Get it On"
4 and not Marvin Gaye, and it seems to be misrepresentative, that
5 text.

6 A. That's what I just said. I just clarified that. I just
7 said the author mentioned Marvin Gaye obviously not realizing
8 that Ed Townsend did the writing. So, of course — so the
9 answer is, yes, I just said that.

10 Q. OK. With regard to Ed Townsend, do you have any personal
11 knowledge as to any of his influences?

12 A. I don't, no.

13 Q. Have you looked at, taken a deep dive, or done any type of
14 analysis of his back catalog or the 165 other songs he's
15 written?

16 A. No.

17 Q. So you wouldn't know one way or the other whether those
18 common elements were combined in that way earlier as well?

19 A. That is correct. And by the way, that is not at issue.

20 Q. Thank you for sharing.

21 A. Sure.

22 Q. I would like to distill it down to this: After we get past
23 all the songs that you cited yesterday, I think you finally
24 arrived at six songs —

25 A. Yes.

N53HGril Ferrara - Cross

1 Q. — six songs that you claim constitute prior art?

2 A. And that is excluding the Van Morrison songs, so six songs
3 above Van Morrison.

4 Q. We'll get to that in a moment. Thank you. I appreciate
5 that.

6 A. Sure.

7 Q. Two of them, two out of the six you cited, actually came
8 after "Let's Get it On," correct?

9 A. That is correct. I testified to the years they were
10 released. One with the basic chord progression in LGO came out
11 after LGO and one with the basic chord progression in TOL came
12 out after LGO. The other four were released prior to LGO.

13 Q. So we're down to four.

14 "You Lost the Sweetest Boy" by Mary Wells, I'll
15 represent to you that Dr. Stewart testified that the rhythmic
16 durations were different in the song. Do you agree or
17 disagree?

18 A. Well, I showed the sheet music. It certainly is the same
19 as in the sound recording, and there's no question that, in the
20 same key as LGO, this 1963 work has a section that has an E
21 flat chord with a G minor chord that anticipates the beat, an A
22 flat chord and then a B flat chord that anticipates the beat.
23 That is the basic chord progression with the identical harmonic
24 rhythm if you have cut in half the harmonic rhythm, as we've
25 done now, for the purposes of analysis.

N53HGril Ferrara - Cross

1 So what I can say is that, to the extent that you have
2 accurately represented Dr. Stewart's testimony, that he's
3 wrong.

4 Q. OK. "Since I Lost My Baby" by Ray French —

5 A. Yes.

6 Q. — that's one of the prior art you cited?

7 A. 1966, yes.

8 Q. Wasn't that a remake or a cover of a Temptations song that
9 was written by Smokey Robinson?

10 A. Exactly, yes.

11 Q. So you didn't go to the original source material, you found
12 a cover?

13 A. No, I went to both.

14 Q. OK.

15 A. And the chord progression in the original is I-iii — that
16 is, lower case iii — I-iii-IV-I. It doesn't go I-iii-IV-V, it
17 goes I-iii-IV-I. And when I checked the cover, the Ray French
18 cover, 1966, I noted and I played for you with that descending
19 melody, it has indeed the identical basic chord progression in
20 LGO.

21 Q. So if I understand correctly, the original work by The
22 Temptations didn't match your prior art analysis, is that fair?

23 A. Well, it mischaracterizes it. When you say it doesn't
24 match my prior art analysis, it was part of my prior art
25 analysis —

N53HGril Ferrara - Cross

1 Q. The original Temptations song "Since I Lost My Baby" as
2 recorded, which you just testified you looked at, didn't have
3 the same elements you're talking about here today?

4 A. Slightly different question.

5 Q. Thank you.

6 A. Some of the elements were there. It had the I, the III,
7 and the IV. It didn't have the V thereafter. So, again, the
8 question is not completely accurate, and so, unfortunately, I'm
9 sorry to take the jury's time, but I want to clarify the
10 answer.

11 Q. Thank you. I appreciate that.

12 "Georgy Girl," what we've talked about a little bit,
13 the Mexican — it's originally by The Seekers, correct?

14 A. That's correct.

15 Q. You're not citing the original Seekers version, you're
16 citing a Spanish-language, was it — was there language in it?
17 I can't remember. Was there singing in it?

18 A. Yeah, *Hey there, Georgy Girl*.

19 Q. OK. There was.

20 Can I ask you, just out of curiosity, where did you
21 find this Mexican "Georgy Girl"?

22 A. You do an online search for covers of "Georgy Girl." But I
23 didn't testify to the Diaz recording. Probably a name you
24 don't recall from my testimony because I didn't testify to it.
25 As I testified yesterday, I found that the identical

N53HGril Ferrara - Cross

1 combination at issue is in the 101 Strings recording of "Georgy
2 Girl." It's still available on iTunes. I also found that the
3 Boston Pops Orchestra recording, that's 1967 and 1968,
4 respectively, also has the identical combination and, in fact,
5 in the same key as LGO.

6 So that those are — those are the two works that I
7 testified to that both predate the creation of LGO by either
8 six or seven years. And I testified that the original — and
9 this is what you're talking about — The Seekers version, in
10 that original version, the — first of all, the chord
11 progression is the same, but the anticipation is partial, you
12 can say, because it's in the guitar part. And by the way, it's
13 also in the vocal, *Georgy Girl*, that's that anticipation, da da
14 da, and the guitar follows that. So the guitar anticipates the
15 chord, the second and the fourth chord, but nonetheless, I want
16 to be absolutely honest, the bass is actually square on the
17 beat.

18 So I said in my testimony, in The Seekers version,
19 while you have anticipation in the guitar and certainly in part
20 in the vocal, you don't have it in the bass. But nonetheless,
21 the two principal ones that I went forward with, that I used
22 the charts, for the 101 Strings were the three that I
23 presented. I didn't mention anything about the Diaz version.
24 Q. As you sit here — I'll get in front of the mic again — as
25 you sit here today and testify, Dr. Ferrara, do you have any

N53HGril Ferrara - Cross

1 information, personal knowledge whether or not — whether or
2 not Ed Townsend had access to the Boston Pops version of
3 "Georgy Girl"?

4 A. I'll answer that in two parts: (1) Obviously, no, and (2)
5 there is no implication — I've made that any number of times
6 yesterday — no implication that I think that Ed Townsend
7 copied anybody in creating this chord progression and
8 anticipation. I made that very clear. It's just simply too
9 commonplace. It's too fundamental a musical building block for
10 one to say, oh, you must have copied so because you've used the
11 same fundamental musical building block.

12 Q. But wouldn't Ed Townsend need to be aware of these specific
13 songs you've cited for them to count as prior art?

14 A. What Ed Townsend had to be aware of, because it is a
15 musical building block, is I-iii-IV-I chord progression. You
16 couldn't be a writer, a musician playing songs, and so forth,
17 you have to be on a different planet —

18 Q. As I understand, doctor --

19 A. Well, if I can continue?

20 Q. — the combination of elements, not the chord progression,
21 are you saying that — you have no evidence to support that Ed
22 Townsend was aware of these songs, do you?

23 MS. FARKAS: I would just request that you let the
24 witness answer the question that you pose to him.

25 MR. FRANK: Sure.

N53HGril Ferrara - Cross

1 Q. I apologize, doctor.

2 A. That's OK.

3 So what we're talking about is the word that you used,
4 Mr. Frank, is combination. We're talking about a combination,
5 so what's been combined. And I was in the midst of explaining
6 that the first thing that's been combined is a musical building
7 block, chord progression, those four chords, I-iii-IV-V. And
8 so you ask me do I have any knowledge as to whether Ed Townsend
9 never heard that I-iii-IV-V chord progression. I can't imagine
10 that —

11 Q. Respectfully, that's not what I asked, I asked if you
12 heard —

13 A. I did hear the question, sir. I'm trying to answer it.

14 Q. I apologize. Proceed.

15 A. Within the context of we're talking about a combination,
16 your word, and so the first element of that, he had to have
17 known. This (clapping), once again, got to be on a different
18 planet not to have heard that anticipation. It's a musical
19 building block.

20 And now here is the direct answer. It's unremarkable
21 to put these two things together. That's why it doesn't matter
22 whether Ed Townsend heard any of those 33 songs that have the
23 chord progression or any of the four songs that have the
24 combination. The point is it's simply unremarkable to put them
25 together because they're two building blocks.

N53HGril Ferrara - Cross

1 Q. If it's unremarkable, Dr. Ferrara, as you suggest, why are
2 there only four songs? You in your vast knowledge of music,
3 you could only find four songs, and it doesn't seem like you
4 can tie any of them to Ed Townsend's knowledge.

5 MS. FARKAS: Mischaracterizes the testimony.

6 Q. Why are there only four songs?

7 A. Shall I answer? Thank you.

8 There are four songs because that is where my prior
9 art search left off. There could be more, but here is the key.
10 What those four songs show is that before the creation of LGO,
11 that there were writers of other songs that did the same thing,
12 that LGO was not the first. And to the extent that that is the
13 case, it informs whether or not LGO was the first or not, and
14 so that's why those four songs are important. They're
15 significant.

16 Q. During your research — well, let me back up.

17 The fourth songs I don't think we've addressed is The
18 Contours song "Do You Love Me."

19 A. Yes.

20 Q. Is that the one?

21 A. It is.

22 Q. Is that the song that "Dirty Dancing" made famous in 1988,
23 "Do You Love Me"?

24 A. I can't say whether — whether its popularity was impacted
25 in any way by "Dirty Dancing." It's a movie that I saw too many

N53HGril Ferrara - Cross

1 years ago and I don't remember it well enough.

2 The key is, to my understanding, "Do You Love Me" was
3 a hit by The Contours. It was in 1962. So the point is that,
4 whether it had another boost through a movie, I don't know.

5 Q. You don't have any direct knowledge that Ed Townsend was
6 aware of this specific song, do you?

7 A. No, of course not.

8 Q. Thanks.

9 Dr. Ferrara, attendant to your research and
10 preparation for testimony in this case, did you have occasion
11 to look at the various mashups online of "Let's Get it On" and
12 "Thinking Out Loud"?

13 A. I viewed the mashup that is at issue, yes.

14 Q. OK. When you say "the mashup at issue," we've
15 affectionately referred to it as the Zurich recording.

16 A. If that is where it was, yes.

17 Q. Are you aware of any other — any other recordings online
18 by famous artists who've combined both of those songs together?

19 A. No, I'm not.

20 Q. You didn't have — curiosity didn't direct you to look?

21 A. That other artists who have combined "Thinking Out Loud"
22 and "Let's Get it On"?

23 Q. Numerous other artists have combined those two specific
24 songs.

25 MS. FARKAS: Objection. I would ask counsel not to

N53HGril Ferrara - Cross

1 testify.

2 MR. FRANK: I was asking whether he was aware of
3 numerous other artists.

4 MS. FARKAS: And he told you he isn't, but you keep
5 asking questions.

6 THE COURT: Mr. --

7 MR. FRANK: I apologize.

8 THE COURT: What you stated is "Numerous other artists
9 have combined those two specific songs." That's not a
10 question. It is a statement, and counsel properly objected to
11 your testifying.

12 MR. FRANK: Yes, your Honor.

13 THE COURT: Try not to.

14 MR. FRANK: Thank you, your Honor. I will.

15 BY MR. FRANK:

16 Q. Dr. Ferrara, when you were — you recall yesterday when you
17 were doing the analysis of the three melodies --

18 A. Yes.

19 Q. -- that have been cited by Dr. Stewart as — I'm sorry. Go
20 ahead. You wanted to say something.

21 A. I have to correct that. There are not three melodies.
22 There are six melodies, Melody A in LGO and Melody A in TOL.
23 They're different melodies. Melody B in LGO and Melody B in
24 TOL. They're two different melodies. Melody C in LGO and
25 melody C in TOL, they're different. They're two different

N53HGril Ferrara - Cross

1 melodies, and the only similarity is da da da da da da da da
2 da, an exercise that string players and kids play every day.

3 Q. Dr. Ferrara, I understand, but if you don't mind, I'd like
4 to ask the questions.

5 A. You suggested that there was a Melody A. There isn't.
6 There are two Melody As, and they're different.

7 Q. Let me reframe the question. I understand that we're
8 comparing melodies in TOL and melodies in "Let's Get it On."

9 Dr. Stewart — would you agree with me that
10 Dr. Stewart has identified three melodic passages that he
11 believes are substantially similar?

12 A. No.

13 MS. FARKAS: Objection.

14 Q. That he believes are similar.

15 A. He identified six passages, not three.

16 Q. OK. With regard to the passages that he identified, what
17 I'm trying to establish is your protocol. You indicated —
18 well, you didn't say anything, but on your slides yesterday it
19 seemed to indicate that you halved the note values of "Let's
20 Get it On" in your comparison.

21 Do I have that correct?

22 A. Yes. For the purpose of analysis, that's correct, and that
23 is what Dr. Stewart did as well.

24 Q. You halved the notes just in "Let's Get it On"?

25 A. Just in "Let's Get it On" as Dr. Stewart did.

N53HGril Ferrara - Cross

1 Q. I wanted to ask you about, also, were you involved in the
2 production of the musical realization of the deposit copy?
3 We've referred to it here at the trial as the AI version of
4 "Let's Get it On."

5 A. No.

6 Q. Didn't —

7 A. I'm sorry. You mean the computerized?

8 Q. The computer-generated song version of "Let's Get it On"
9 that we heard, were you involved in its creation?

10 A. No, not at all.

11 Q. Wasn't your colleague at NYU involved in it?

12 A. The person that defendants' counsel contacted is Professor
13 Paul Geluso. He heads the music technology program at NYU
14 Steinhardt. It's a bachelor's, master's, and Ph.D. program.
15 He has, in fact, testified and been deposed, so he is an entity
16 that is well-known, but he's a music technologist, not a
17 musicologist. And it is my understanding that defendants'
18 counsel contacted Professor Geluso directly. I have not and
19 would not discuss this with Professor Geluso. That would be a
20 problem of privilege and confidentiality.

21 So the answer is, to be sure, I was not involved with
22 the creation, and I was not involved with any decisions that
23 were made between defendants' counsel and Professor Geluso.

24 Q. Thank you very much. That's what I was trying to find out.

25 A. Sure. Thank you.

N53HGril Ferrara - Cross

1 Q. Doctor, it seems in your testimony that you've gone to
2 great lengths to suggest that "Let's Get it On" is not
3 original. Do you believe "Let's Get it On" is not original?

4 A. Once again, "original" is a legal term, as well as an
5 English-language term, and so I'm very careful not to use
6 "original" so that I am not mixing musicology with the law.

7 What I have preferred to say, rather than use the word
8 "original," is to say "not the first." And so if you don't
9 mind, it's easier for me to answer the question if it's not
10 using the word "original," which has legal overtones.

11 Q. I appreciate that, Dr. Ferrara.

12 Would you agree with me that "Let's Get it On" is —
13 was and is a very successful song commercially?

14 A. It is, it was, and I love it.

15 Q. Well, thank you for that.

16 So I guess my question for you, Dr. Ferrara, is if
17 there's nothing — well, if it's not the first, to use your
18 terminology --

19 A. Not the first to use the combination of similarities,
20 specifically, the chords and the anticipation. There is no
21 combination of melodies because similarities are nonexistent.
22 There's six different melodies.

23 Q. The songs that you cited as prior art, "Six-Pack Summer"
24 and "Since I Lost My Baby," people aren't still singing those
25 all over the world, are they?

N53HGril Ferrara - Cross

MS. FARKAS: Objection. Lacks foundation.

A. Yeah. First, I certainly am not a marketing or business affairs person, so I can't tell you how many people — *Do you love me*, da da bump, I don't know how many people stream that, but it wouldn't surprise me if a lot of people continue to listen to The Contours version, but I have no evidence one way or the other on any of those songs as to who was listening to them. Of course, that is irrelevant to the musicological work that's being done.

Q. Well, it seems like you've gone to great lengths to find what you've referred to as prior art, going so far as to citing the "Georgy Girl," the Spanish version. Doesn't that suggest — the reliance on these esoteric songs, doesn't that suggest uniqueness or creativity in "Let's Get it On"?

MS. FARKAS: Objection to form and mischaracterizes his testimony.

Q. The fact that you —

MS. FARKAS: Would you let him rule on the objection.

THE COURT: Sustained.

Q. Does the fact that you need to go to such lengths to find what you term prior art suggest in itself that "Let's Get it On" is pretty novel or unique?

MS. FARKAS: Objection.

A. The answer is —

MS. FARKAS: Let him —

N53HGril Ferrara - Cross

1 A. — is no.

2 Q. He has to rule first.

3 THE WITNESS: I'm sorry, your Honor.

4 THE COURT: I'm trying to figure out the reasoning
5 underlying that question, and it alludes me. So I suppose that
6 we're in the hands of an experienced expert. We better take
7 his answer.

8 A. So you continue to —

9 THE COURT: To me it sounds like a *non sequitur*.

10 MR. FRANK: I understand.

11 Q. If you understand the question, Dr. Ferrara.

12 A. Sure. Yes, I think I understood it.

13 You continue to use the version by Diaz. Once again,
14 I did not testify with respect to Diaz. And Dr. Stewart, in
15 his presentation, called Diaz an obscure Mexican bandleader, or
16 something, talked about the fact that no one outside of Diaz's
17 backyard would have heard this. Very insensitive and, I think,
18 impolite language that was literally, you know, a part of
19 Dr. Stewart's testimony and his report.

20 That notwithstanding, I haven't used that. The idea
21 that 101 Strings, that is a — that is a version, in fact, that
22 has been on more than 101 Strings albums; that is, they have
23 different albums that put together certain tracks, certain
24 songs from earlier albums. So this continues to be on — in
25 fact, I'm pretty sure maybe a couple of weeks ago I looked on

N53HGri1

Ferrara - Redirect

1 iTunes and I found the 101 Strings version of "Georgy Girl"
2 still available on two different albums.

3 So the point is you can call it obscure, but it's not.
4 And the point is that it doesn't matter if it's obscure. What
5 matters is that LGO didn't do it first, and it is not
6 particularly remarkable to put these two musical building
7 blocks together.

8 Q. Presumably, doctor, Ed Townsend didn't have access to
9 iTunes in 1973, did he?

10 A. Obviously, no, and that's irrelevant.

11 MR. FRANK: Thank you, doctor. I'll tender the
12 witness.

13 REDIRECT EXAMINATION

14 BY MS. FARKAS:

15 Q. Dr. Ferrara, yesterday, I believe plaintiffs' counsel asked
16 you a question about the *Skidmore-Led Zeppelin* case, and he
17 referenced a comment made in that case about — that you are
18 the go-to expert for major industry players, and he gives them
19 the opinions they want. Do you remember that questioning
20 yesterday?

21 A. Yes, I do.

22 Q. And that quote that Mr. Frank read to you, was that an
23 opinion or a statement or a conclusion by the Court in that
24 case?

25 A. Absolutely not. It was an opinion by the

N53HGri1

Ferrara - Redirect

1 plaintiffs' counsel being an advocate for their client.

2 Q. And the Court in *Skidmore* actually accepted your opinions
3 over the opinions of Dr. Stewart, isn't that correct?

4 A. That is correct, both at the district court, the appellate,
5 and the en banc.

6 Q. You have identified 101 songs that contain the chord
7 progressions at issue in this case, and I believe eight songs,
8 including Van Morrison songs, that include the combination that
9 has been placed at issue.

10 Other than "Georgy Girl" and "You Lost the Sweetest
11 Boy" in which Dr. Stewart conceded those songs contain the
12 combination at issue, did Dr. Stewart address any of the other
13 combination prior art that you identified?

14 A. If we put them in two categories of the six, you're correct
15 that he only dealt in his testimony with "Georgy Girl" and "You
16 Lost the Sweetest Boy." He did not dispute in any way or
17 analyze the other four combination prior art.

18 With respect to the Van Morrison songs, he only put up
19 a slide, and as I said, it was a slide that failed by omission,
20 of just the opening of "Crazy Love." He didn't go into the
21 other Van Morrison songs, but he did do "Crazy Love," and he
22 did it in a way that was really deeply, deeply flawed, leaving
23 out all of the other expression that was indeed at issue.

24 So he failed to dispute four of the six of what we
25 could call the combination prior art, and he only dealt with

N53HGri1

Ferrara - Redirect

1 one in a very flawed way of the Van Morrison.

2 Q. And other than mentioning — I'm now focusing on the
3 exhibit that had 101 songs that contain the chord progressions
4 at issue, Exhibit 210 — other than mentioning 15 of those
5 songs, did Dr. Stewart even address any of the other prior art
6 that you found?

7 A. In reviewing Dr. Stewart's testimony, I didn't find any
8 dispute of the other songs, other than those that you've just
9 mentioned.

10 Q. Now, in your testimony a few minutes ago when Mr. Frank was
11 asking you questions, I think at one point you referred to this
12 list as songs containing the combination of the chord
13 progression and the anticipation at issue. I just want to make
14 the record clear that Exhibit 210 solely addresses the chord
15 progressions at issue, correct? I'm sorry.

16 A. If I misspoke, by the 80 songs, I meant, to be sure, the
17 four chord progression in LGO that either predate or postdate
18 LGO.

19 Q. Right.

20 A. Only the chord progression.

21 Q. And to the extent that any of these songs on this list of
22 101 also contain anticipation, they have been discussed in your
23 other testimony, correct?

24 A. That is correct.

25 Q. Dr. Ferrara, whether there is two songs or three songs or

N53HGri1

Ferrara - Redirect

1 five songs or seven songs that predate "Let's Get it On" that
2 contain the combination at issue, would that change your
3 testimony that "Let's Get it On" wasn't the first to combine
4 these elements?

5 A. If there were a few more or one or two less, it would not.

6 Q. Do you know who wrote "Do You Love Me"?

7 A. Yes, Ed Townsend. It's a great song, 1958.

8 Q. No, no, we're talking about —

9 A. Oh, "Do You Love Me," yeah.

10 Q. Was that Berry Gordy?

11 A. I was thinking of Ed Townsend's great 1958 "For Your Love,"
12 *For your love I would do anything*. Sorry. Ask the question
13 again.

14 Q. So the song "Do You Love Me," was that written by Berry
15 Gordy?

16 A. Yes.

17 Q. Do you know who Ed Townsend was writing "Let's Get it On"
18 for? Was he also writing for Berry Gordy at the time?

19 A. My understanding is that "Let's Get it On" was released by
20 one of the subsidiaries of Motown Records, which, of course,
21 would be Gordy.

22 MS. FARKAS: No further questions at this time, your
23 Honor.

24 MR. FRANK: No redirect, your Honor — recross.

25 THE COURT: Thank you, Dr. Ferrara. You're excused.

N53HGri1

Ferrara - Redirect

1 THE WITNESS: It has been an honor. Thank you.

2 (Witness excused)

3 MS. FARKAS: Your Honor, the defendants rest.

4 THE COURT: I'd like to see a representative from each
5 side briefly at the sidebar because I want to discuss the
6 schedule of day, and anybody who's capable of doing that can
7 help me. And the reasons are so that I can advise the jury.

8 (Continued on next page)

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Ferrara - Redirect

1 (At sidebar)

2 THE COURT: My theory is that we could have — it's
3 12:15 now. We could have a charge conference at about 12:30.
4 I'm ready to go on it.

5 MR. ZAKARIN: I don't know.

6 THE COURT: Does it take two of you? You're welcome
7 to stay.

8 MR. FRANK: It's OK.

9 THE COURT: But if we have a charge conference at,
10 say, 12:30, get that out of the way before lunch, have closings
11 arguments starting after lunch --

12 MR. FRANK: Yes, your Honor.

13 THE COURT: -- with the hope that we'll get to enough
14 time left for (a) giving the charge and letting the jury
15 deliberate for a little while before they go home. Generally,
16 it's a good idea to give them an hour or so of actually
17 deliberating if they want to.

18 MR. ZAKARIN: Your Honor, two things, your Honor, if I
19 can.

20 THE COURT: Yes.

21 MR. ZAKARIN: One —

22 THE COURT: It wouldn't change the schedule.

23 MR. ZAKARIN: What I was going to suggest — not so
24 much. I don't know if you have any rebuttal case or not.

25 MR. FRANK: No, no rebuttal case.

N53HGri1

Ferrara - Redirect

1 THE COURT: So it's defendant, plaintiff.

2 MR. FRANK: No, no, no, we have no rebuttal.

3 MR. ZAKARIN: OK.

4 THE COURT: Well, and in argument, in summations, I
5 think I may have said at some point that we would use the
6 criminal common one of plaintiff, defendant, rebuttal. It
7 seems to me in this case really more sensible to do it as the
8 civil way: defendant, plaintiff, then charge.

9 MR. ZAKARIN: We're fine with that, your Honor.

10 THE COURT: It's not a major difference.

11 MR. FRANK: I'm sorry. Wouldn't it be plaintiff,
12 defendant, plaintiff, rebuttal?

13 THE COURT: Well, that's — you see, that's what I'm
14 asking.

15 MR. FRANK: Yes, that's what we'd — yes.

16 THE COURT: It would be — we would use the civil form
17 used in this court, which is defendant, plaintiff, charge.
18 There isn't a rebuttal.

19 MR. FRANK: OK.

20 MR. ZAKARIN: We're fine with that, your Honor.

21 MR. FRANK: We would like the opportunity for
22 rebuttal.

23 THE COURT: Well, because you like to save things and
24 do them later, and I'm thinking that the best way for the jury
25 and the case is to do it the other way —

N53HGri1

Ferrara - Redirect

1 MR. FRANK: Yes, your Honor.

2 THE COURT: — which is the common way in this court
3 in civil cases.

4 MR. FRANK: Yes, your Honor.

5 THE COURT: There has been a lot of argument along the
6 way, and put it into your closing statement.

7 MR. FRANK: Yes, your Honor.

8 MR. ZAKARIN: I have one more piece, which is
9 consistent with the rules, and I think I know the answer, but
10 we would want to make a further 50(a) motion at the close,
11 which I can do very quickly orally for your Honor.

12 THE COURT: I'm glad you raise that. You should make
13 your motion. Whoever loses should make it.

14 MR. ZAKARIN: Yes.

15 THE COURT: I'll reserve argument on it until after we
16 have a verdict.

17 MR. ZAKARIN: Yes, your Honor.

18 THE COURT: So just make it for the record purposes —

19 MR. ZAKARIN: That's what I wanted to do.

20 THE COURT: — rule purposes.

21 By the way, Mr. Frank, it's on my conscience. I said
22 to you the other day, I think yesterday, that the question
23 about the disclosure of experts was in the Federal Rules of
24 Civil Procedure. I haven't had time to check it, but it came
25 to me in the night that it may well be in the 28 U.S. Code

N53HGri1

Ferrara - Redirect

1 instead.

2 MR. FRANK: I think you might be right, your Honor.

3 THE COURT: Well, I've got to be right one or the
4 other.

5 MR. FRANK: Yeah, absolutely. Thank you for that. I
6 appreciate that.

7 THE COURT: I'm not too embarrassed to miscite it
8 probably.

9 MR. CRUMP: Judge, can I ask a question? The
10 plaintiffs were prepared to do it the way that we had
11 traditionally done closing with plaintiff, defendant, and then
12 rebuttal. We understand that the Court isn't going to do it
13 that way. Can the plaintiffs have the closing argument divided
14 between the two people, because that's how we were prepared to
15 go forward today?

16 THE COURT: What's the reason for it?

17 MR. CRUMP: Because we — we prepared that we were
18 going to have one person make the first argument and then
19 another person make the rebuttal argument as —

20 THE COURT: Well, this was going to be somebody else
21 and then you. I remember that.

22 MR. CRUMP: Yes, sir, and that's how we prepared to do
23 it, but if —

24 THE COURT: And I'm asking the reason.

25 MR. CRUMP: Because that's what our client prefers.

N53HGri1

Ferrara - Redirect

1 She wanted me to be the —

2 THE COURT: Why don't you do it all?

3 MR. CRUMP: Well, we — we can. We hadn't prepared
4 for that, but we can.

5 We would respectfully request that the Court would let
6 us divide it, but as always, we've been following your
7 direction, Judge. But that's what we wanted to do, and we're
8 letting the Court know that's how we prepared to do it.

9 THE COURT: Well, is that so that you can make the
10 estate administration argument?

11 MR. CRUMP: No, sir. Every time you gave me an
12 instruction, I tried to change everything I did.

13 THE COURT: I'm not saying you don't. I'm just trying
14 to fathom the reason for splitting the closing argument.

15 MR. FRANK: I think we were operating under the
16 understanding that we had a rebuttal. That's why we split it.

17 THE COURT: I see.

18 MR. CRUMP: Yes, sir.

19 MR. FRANK: That's why we split it up.

20 THE COURT: Do you care?

21 MR. ZAKARIN: You know, in civil cases I'm most
22 accustomed to one person closing and not dividing it up. I've
23 never seen it. It doesn't —

24 THE COURT: You see, this is what they do in Florida.

25 MR. ZAKARIN: I know. And if we were trying this case

N53HGri1

Ferrara - Redirect

1 in Florida, I would accommodate their methodology, but we're
2 trying it here.

3 MR. CRUMP: I've tried cases — two cases in New York,
4 and we've done it that way, Judge. I'm not trying to do
5 anything deceptive. Out of all the cases I've tried, I've
6 always done plaintiff, defendant, rebuttal, but —

7 THE COURT: How long do you think you'll be?

8 MR. CRUMP: No more than 30 minutes.

9 THE COURT: Hmm?

10 MR. CRUMP: No more than 30 minutes.

11 MS. FARKAS: That's the one or two?

12 MR. CRUMP: An hour, tops.

13 THE COURT: Him 20 minutes. So it collapses 20
14 minutes into his closing.

15 MR. CRUMP: Yes.

16 THE COURT: I haven't seen it, but there's a new day
17 for everything.

18 MR. FRANK: Yes, your Honor.

19 THE COURT: OK. I'll do that.

20 MR. CRUMP: Thank you, your Honor.

21 MS. FARKAS: Just, your Honor, so I'm clear, they're
22 going to go first, and they're going to go twice?

23 MR. ZAKARIN: They're going to divide it up.

24 THE COURT: Yes.

25 MS. FARKAS: I didn't think they were going to say the

N53HGri1

Ferrara - Redirect

1 same thing twice.

2 THE COURT: How long do you think you'll be?

3 MS. FARKAS: Forty minutes.

4 THE COURT: Yes. That's good.

5 And you, jointly?

6 MR. CRUMP: Yes, sir. No more than an hour, but 40
7 minutes is fine.

8 THE COURT: Something around that.

9 MR. CRUMP: Yes, sir.

10 THE COURT: Two hours in all. I think we can do it.

11 OK. Thank you.

12 MR. FRANK: Thank you, your Honor.

13 MR. CRUMP: Thank you, your Honor.

14 (Continued on next page)

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N53HGri1

(In open court; jurors present)

THE COURT: We think a practical schedule is for you to take a recess now. We have to do legal work about the charge that's a part of every case, and I think we can regroup at 2:15 and have the closing arguments. They'll take about two hours, or maybe less, and then the charge itself will take 20 minutes, half an hour. And then at the end of that, you'll be deliberating.

That's the program, so enjoy lunch.

(Jury excused)

(Continued on next page)

N53HGri1

(Jury not present)

THE COURT: You'll need time to read that. Let's resume at quarter of 1:00.

MR. FRANK: Yes, your Honor.

MR. ZAKARIN: Your Honor, if I might, do you want to do the 50(a) for the record?

THE COURT: Yes.

MR. ZAKARIN: In the robing room during — or now?

THE COURT: Yes, yes.

MR. ZAKARIN: OK. Here now?

THE COURT: Just place on the record, your — yes.

MR. ZAKARIN: Your Honor, we will formally file our posttrial, post-close of evidence 50(a) motion.

Just very quickly, to summarize the points, they (a) duplicate the points we made before, which is the plaintiffs have not proved in any shape, manner, or form sufficient to go to a jury any of their claims.

But, more importantly, during the defendants' case, Dr. Ferrara, in particular, demonstrated conclusively that the plaintiffs have not introduced any evidence on melodies or similarity of melodies. All they've introduced are pitch sequences, which are uncopyrightable to begin with, pitch sequences being like letters of the alphabet; that the chord progression, as your Honor has already ruled, is commonplace, unprotectable, same thing with the anticipation; and that the

N53HGri1

1 combination preexisted. There is no dispute in the evidence on
2 that.

3 And of course, while the plaintiffs have recently
4 added the melodies to their selection and arrangement or
5 combination claim, the melodies are utterly and completely
6 different, and plaintiffs did not even provide any evidence
7 about comparing the melodies.

8 So there's nothing there. Indeed, it's
9 self-defeating, because under the law, properly, to avoid
10 restricting the development of intellectual property, selection
11 and arrangement claims are thin copyrights. They require — as
12 the last element, they require numerosity, they require that it
13 be new or novel, and of course we know that they're not new or
14 novel. The evidence is clear it wasn't. And the third element
15 is that they have to be identical, or virtually identical, one
16 to the other. And the introduction, not only — strike that.

17 Not only are the chord progressions different and the
18 anticipation different, and Dr. Ferrara testified to that, but
19 the melodies, or the supposed melodies, as well as the pitch
20 sequences, which as I said are uncopyrightable, the melodies
21 are totally different. There's no similarity. So using them
22 as an element of a selection and arrangement claim defeats the
23 claim all on its own.

24 So we don't believe that there is anything that need
25 be submitted to the jury. While we are grateful for their

N53HGri1

1 service — they were wonderful, they were attentive, it was
2 terrific trying a case in front of them, and I would hate to
3 deprive them of the opportunity — this is the rare case where
4 we truly believe that there's nothing to be submitted to the
5 jury. They could not come to a verdict otherwise than to
6 dismiss the complaint here, and we respectfully request that
7 our 50(a) motion be granted.

8 Thank you, your Honor.

9 THE COURT: The question of numerosity is an open one,
10 maybe not wide open, but open in this circuit. There are cases
11 in the Ninth Circuit which consider it a question of law and
12 don't allow more than four, in rough terms.

13 MR. ZAKARIN: I agree, your Honor, with that. I agree
14 with that.

15 THE COURT: I am aware of that and am reserving my own
16 views on it to take the verdict and let the jury vote on it as
17 a question of fact. I tilt towards the position that it's a
18 question of law, but I'm reserving the issues on that until we
19 see what the verdict is so that if I'm wrong in what I
20 ultimately do, the case doesn't have to be retried.

21 The same is true with the balance of the issues under
22 Rule 50. We'll reserve the briefing on that until after the
23 verdict is delivered.

24 MR. ZAKARIN: I understand. Thank you. And thank
25 you, your Honor.

N53HGri1

1 THE COURT: See you in about 15 minutes.

2 MR. FRANK: Thank you, your Honor.

3 (Recess)

4 THE COURT: Who is speaking for the plaintiff?

5 MR. FRANK: I will, your Honor.

6 THE COURT: For the defendant?

7 MR. ZAKARIN: I will speak, your Honor.

8 THE COURT: What I need, and following the rule, is an
9 indication of the line and page and the language which the
10 lawyer proposes, and we proceed through the proposed charge
11 page by page.

12 Anybody got anything on page 1?

13 MR. FRANK: Your Honor, yes, if I could — as a
14 preliminary matter, we noticed that we don't have Atlantic —
15 the other two defendants listed, Atlantic and Sony/ATV.
16 They're not listed at all in the forms, and they're defendants
17 in the case.

18 THE COURT: Whether they're mentioned or not has
19 nothing to do with the law as I state it to the jury. And at
20 the beginning of the case I defined the term "Townsend" as
21 including those defendants.

22 Next point.

23 MR. FRANK: I understand. And your Honor, given that
24 there are the other two defendants that are rolled into the —
25 rolled into that definition, we're requesting that there be a

N53HGri1

1 — I think that you used the Ninth Circuit, that the Ninth
2 Circuit instructions were used for this —

3 THE COURT: The what?

4 MR. FRANK: — we'd like a vicarious liability
5 instruction as it relates to Sony and Atlantic.

6 THE COURT: No, I'm not going to get into that. It
7 can be dealt with after trial.

8 MR. FRANK: OK.

9 THE COURT: Who's got the lowest page number?

10 MR. ZAKARIN: Your Honor, we have nothing until
11 page 9.

12 THE COURT: You got anything before page 9, Mr. Frank?

13 MR. FRANK: We don't have anything else on the jury
14 instruction, your Honor.

15 THE COURT: OK. That gives you a clear field,
16 Mr. Zakarin, starting on page 9.

17 MR. ZAKARIN: Starting on page 9, your Honor, line 21
18 — and this will be something that we repeat — it talks in
19 terms of the selection and arrangement as expressed, it says:
20 "Arrange the numerous elements in an original way," and I think
21 "original" is unclear.

22 THE COURT: What language would you prefer?

23 MR. ZAKARIN: I would prefer "new" or "novel," which
24 is consistent with the cases that we have seen.

25 THE COURT: I agree, novel.

N53HGri1

1 MR. ZAKARIN: "Novel" is fine, your Honor.

2 THE COURT: Excuse me?

3 (Discussion off the record)

4 THE COURT: I think maybe I should hear you more fully
5 on that, Mr. Zakarin, because my lawyer tells me that the
6 Second Circuit prefers "original" as a legal term with which
7 they have — which has meaning and with which they are
8 familiar.

9 MR. ZAKARIN: I think they do, your Honor, in terms of
10 the copyrightability. I don't think they do — I don't know if
11 I'm not — I don't think they do in terms of the selection and
12 arrangement because I think they look to whether what has been
13 selected and arranged is new or different or unique as opposed
14 to merely original. Originality, we believe, goes to
15 copyrightability, and this goes to infringement, at least as
16 we've looked at the law.

17 And let me see also — this is — and the cases that
18 we have cited to your Honor in terms of — there's New York
19 cases which talk about the new combination that is the novel
20 arrangement. That's picking up from *Skidmore*, but it's also
21 picked up in the Western District of New York in —

22 THE COURT: Oh, I've made a considered decision not to
23 go into the New York law on this point. In a diversity case,
24 of course, we do, and as a status which in our own federal
25 vocabulary does not. The learning and the rulings I'm

N53HGri1

1 concerned with are going to be purely federal. That doesn't
2 define the universe very narrowly. And this is not a brief.
3 It's a communication to the jury that we want to have as clear
4 as possible.

5 Why is either "original" or "novel" preferable?

6 MR. ZAKARIN: The reason why, your Honor, is because I
7 think "original" has not been explained to them in the context
8 of this case. "New" and "novel" has been described, and "new"
9 and "novel" is what is used for selection arrangements because
10 it's combining the elements in a way that's not been done
11 before. Originality, which is a different bar for
12 copyrightability, is a different and a lower bar, which is not
13 the same for whether a selection and arrangement infringes.

14 So we view new — either new or novel as being the
15 appropriate standard, which we think is consistent with the
16 cases in this circuit as well as in the Ninth Circuit.

17 THE COURT: My lawyer tells me — and this may be a
18 consideration of some utility — that novel is a higher
19 standard than original, and it has not been used in the Second
20 Circuit. For purposes of caution with the jury, if "novel" has
21 a connotation of higher than "original," then I don't want to
22 use it. I want the bar to be, while existent, lower rather
23 than higher.

24 MR. ZAKARIN: Then, your Honor —

25 THE COURT: I think I'll stick with "original," then.

N53HGri1

1 MR. ZAKARIN: Your Honor, if I can say, if we're not
2 going to do "new" or "novel," I understand the idea of
3 "original," but instead what if it were "not been done before"?
4 Because we think that is truly the test, that it doesn't
5 preexist.

6 THE COURT: You want to say "new"?

7 MR. ZAKARIN: "New," I could live with "new" or "not
8 been done before." The reason — I don't want to interrupt
9 your clerk.

10 The reason that I think this is of some importance,
11 originality is the bar, and a low bar, for copyrighting
12 something. But selection arrangement — and the courts in this
13 district and this circuit have made clear that when you're
14 dealing with a selection and arrangement, to avoid restricting
15 the use of commonplace elements, it has to be something that is
16 new. It's something that's not been done before. Originality
17 goes to copyrightability, and new, novel, not been done before
18 goes to restricting the selection and arrangement, providing
19 for thin copyright protection, not the same copyright
20 protection that would be available for a "original" work.

21 THE COURT: You've got your points on the record,
22 Mr. Zakarin. I think I'm going to stay with "original," even
23 if it hampers you in arguing the appeal.

24 MR. ZAKARIN: I'm hoping, regardless, that I'm not
25 going to be on the side of arguing the appeal, except maybe on

N53HGri1

1 the adverse side.

2 Since your Honor is staying with "original," that
3 addresses and resolves line 4 on page 10. My next comment is
4 on line 18, on page 10, your Honor.

5 THE COURT: Line?

6 MR. ZAKARIN: 18.

7 THE COURT: 18?

8 MR. ZAKARIN: Yes.

9 THE COURT: And you'd like to have that read?

10 MR. ZAKARIN: Well, what you're — what it says is
11 that that "Thinking Out Loud" is substantially similar to those
12 protected elements and only those protected elements, and I
13 think what you're referring to there, since it is the
14 quote/unquote melodies or pitch sequences, and I would want
15 after "protected elements" on line 18, "which are not the chord
16 progression or anticipation."

17 THE COURT: Would you like to take out the language,
18 "and only those protected elements"?

19 MR. ZAKARIN: No, because I think only those protected
20 elements is what you're driving at.

21 THE COURT: Aha.

22 MR. ZAKARIN: But I'm suggesting that the chord
23 progression and anticipation, consistent with your own rulings,
24 are not protected. Those are not protected elements. You're
25 not dealing with the selection and arrangement with this part

N53HGri1

1 of the instruction.

2 THE COURT: How would you like it to read?

3 MR. ZAKARIN: After the word "elements" in line 18,
4 where it says "only those protected elements," I would put in
5 "which are not the chord progression and anticipation."

6 THE COURT: I don't think — I think it's just a
7 complication at this point. They're dealt with separately.

8 MR. ZAKARIN: I just wouldn't want the jury to be
9 confused about the chord progression and anticipation being
10 among the protected elements, as they're not.

11 THE COURT: It might be an improvement, but I think
12 I'll live without it.

13 MR. ZAKARIN: In line 24 --

14 THE COURT: Yes.

15 MR. ZAKARIN: — you have substantial means the amount
16 that's been copied is more than *de minimis*, minimal. I don't
17 know where that is — I don't know if that's in a definition of
18 substantial similarity that I've seen. I think saying that —

19 THE COURT: It comes out of some case. How would you
20 like to have it read?

21 MR. ZAKARIN: I would — substantial means the amount
22 that was copied is significant or is significant in amount or
23 is qualitatively and quantitatively significant.

24 THE COURT: The case that I just finished reading, I
25 guess yesterday, used the words "*de minimis*" and "minimal." I

N53HGri1

1 think I'll stick with that. I was shocked a little bit at how
2 low it was.

3 MR. ZAKARIN: I think, your Honor, that is dealing
4 with fragmented literal similarity, and I think that's not the
5 normal standard for copyright infringement that substantial
6 similarity is simply *de minimis*. I think the standard that we
7 have seen, at least that I've seen — I don't have the cases in
8 front —

9 THE COURT: I'll take out "*de minimis*" on the ground
10 that Latin is probably no longer taught in the common schools,
11 but I'll leave it as "minimal," which catches the thought.

12 MS. FARKAS: Your Honor, if I could just make — my
13 concern is that the suggestion in what you're telling the jury
14 there is that substantial is anything more than minimal, and
15 substantial is something that is significant and something
16 meaningful. So we're leaving no roadway between something that
17 is minimal and substantial. There's a lot in between there.

18 MR. ZAKARIN: I mean, we think — we do think, your
19 Honor, that —

20 THE COURT: I'll leave it as it is, "minimal," no "*de*
21 *minimis*."

22 MR. ZAKARIN: Turning to page 11, your Honor —

23 THE COURT: Line?

24 MR. ZAKARIN: Line 3, at the end of line 3 where
25 you're talking now about the combination —

N53HGri1

1 THE COURT: Very close copying.

2 MR. ZAKARIN: Very close copying. And we think that
3 — I understand where that's coming from, but I believe that
4 the cases, *Odegard*, for instance, which is a Southern District
5 case, showing that the defendant used the same selection and
6 arrangement, it is the identity — or identical or virtual
7 identical standard. Very close copying is not quite the — not
8 quite the same selection and arrangement or the identical —

9 THE COURT: What would you like to say?

10 MR. ZAKARIN: We would like, your Honor, a showing
11 that they — requires a showing of identity or virtual identity
12 between the selection — between the combination or that they
13 are the same.

14 THE COURT: The trouble is that "very close" was the
15 language the Second Circuit used. The thought is not so very,
16 very different, but it is what the circuit said. I think we're
17 stuck with it.

18 Moving right along.

19 MR. ZAKARIN: Yes, I'm trying to, your Honor. Again,
20 we've gone through the protected elements point already. I
21 just don't want — this is on line 12. Just my concern only is
22 I think you're referring to —

23 THE COURT: What line?

24 MR. ZAKARIN: Line 12, your Honor. I think here, I
25 just want to make sure that the jury would not be confused by

N53HGri1

1 the difference between the selection and arrangement versus the
2 protected elements.

3 THE COURT: Mr. Zakarin.

4 MR. ZAKARIN: Yes, your Honor.

5 THE COURT: If the jury is not confused by this, they
6 haven't read it.

7 MR. ZAKARIN: That may well be true. But my concern
8 is that we get a verdict that's consistent with the evidence.

9 Again, the only thing that I would do with that is,
10 again — and your Honor has sort of indicated not in the prior
11 situation — is that the protected elements do not include the
12 chord progression and anticipation. And we had just been
13 talking about substantial similarity, the selection and
14 arrangement —

15 THE COURT: Well, those elements keep coming in and
16 going out.

17 MR. ZAKARIN: I've noticed that myself, your Honor.

18 THE COURT: Thank you.

19 Anything further?

20 MR. ZAKARIN: On the jury instructions themselves,
21 your Honor, no.

22 THE COURT: Thank you.

23 Are you talking about the verdict form?

24 MR. ZAKARIN: On the jury — I was just speaking to
25 the jury instructions. I thought Mr. Frank might want to

N53HGri1

1 address the special verdict form first, if he has any comments.
2 If not, I will.

3 MR. FRANK: Now that you've clarified the issue with
4 the vicarious issue, we don't have anything on the verdict
5 form.

6 THE COURT: OK. Let's resume at 2:15.

7 MR. FRANK: I think they may have.

8 MR. ZAKARIN: We do have some comments on the special
9 verdict form, your Honor.

10 THE COURT: Well, that's what I asked you.

11 MR. ZAKARIN: I just wanted to see if Mr. Frank had
12 any comments on that first because I just —

13 THE COURT: Look, it's 1:20, Mr. --

14 MR. ZAKARIN: I'll be as quick as I can, your Honor.

15 Instruction No. 3, our concern is that we don't think
16 there's any evidence that they put in comparing melodies, and
17 it seems to start in Instruction 3 and Question 3 that Melody
18 A, B, and C are original. It would have — we would think
19 original, presumably, would be to LGO, and we think that a
20 question should first be have they proved that there exists any
21 melodies? And I would put in, I guess, ahead of that that the
22 alleged Melody A, B, and C.

23 THE COURT: Oh, is that the only improvement?

24 MR. ZAKARIN: On that particular question.

25 THE COURT: Yes — no, on the — please.

N53HGri1

1 MR. ZAKARIN: No, your Honor. Again, if you're going
2 to do it, you also have in Question 6 "*de minimis*" again. Your
3 Honor —

4 THE COURT: I'm sorry.

5 MR. ZAKARIN: In addition to "*de minimis*," where you
6 talk about protected elements, I assume that you're talking
7 about the melodies there in Question 6. Instead of protected
8 elements, I think you're referring to melodies.

9 THE COURT: Yes. You want "minimal" instead?

10 MR. ZAKARIN: I guess, if that's going to be
11 consistent with your instructions.

12 THE COURT: Consistency, yes. OK.

13 MR. ZAKARIN: Your Honor, you're dealing with minimal,
14 and under where it says "protected elements," we think it
15 should say "melodies" as opposed to "protected elements" so
16 it's specific.

17 THE COURT: Look, we've got too much to do to indulge
18 in quibbles.

19 MR. ZAKARIN: OK, your Honor. I'm just trying to be
20 as clear as I can. I'm not —

21 THE COURT: Thank you.

22 MR. ZAKARIN: It's —

23 THE COURT: See you all at 2:15 — did you have any,
24 Mr. Frank?

25 MR. FRANK: No, your Honor.

N53HGri1

1 MS. FARKAS: Your Honor, just one more thing. This is
2 not really substantive. I think, unless — I've read it three
3 times, maybe it's me. But Instruction No. 5 seems to suggest
4 that you skip it no matter what, and I don't know that that was
5 the intent.

6 THE COURT: No, it has — that's sort of a shocking
7 effect at first, but then you realize it doesn't really mean
8 that. I share your reaction, but it does — it's OK the way it
9 stands. Thank you.

10 MR. ZAKARIN: The only other thing, your Honor, is at
11 the end of Question 7, I think the word "Loud" was left out.

12 THE COURT: I think it was. Thank you.

13 MR. FRANK: Thank you, your Honor.

14 THE COURT: A winning point.

15 MR. ZAKARIN: I'm glad that I got one at least.

16 THE COURT: Good.

17 (Lunch recess)

N531GRI2

Summation - Ms. Farkas

AFTERNOON SESSION

2:26 p.m.

(In open court; jury present)

MS. FARKAS: Your Honor, may I proceed.

THE COURT: Yes, please.

MS. FARKAS: Good afternoon.

I stood here before you last Tuesday and I told you what we would prove and I told you what the plaintiffs would not be able to prove. We said we would prove three critical things that entitle Ed Sheeran, Atlantic Records, and Sony Music Publishing to a verdict rejecting the claim of infringement in this case.

First, we told you that the evidence would show that Ed Sheeran and Amy Wadge independently created "Thinking Out Loud." And the evidence we presented to you, through the testimony of the only two people who were there when "Thinking Out Loud" was created — Ed Sheeran and Amy Wadge — is completely un rebutted by the plaintiffs.

That means there is not a single shred of evidence that is contrary to the testimony of Ed Sheeran and Amy Wadge, who are both dedicated and successful songwriters. They independently created "Thinking Out Loud." And they told you exactly how it came to be that they wrote "Thinking Out Loud." They told you the inspiration for the song; they told you how the chord progression came about and how the anticipation came

N531GRI2

Summation - Ms. Farkas

1 about; and they told you how the melodies in the song came
2 about. And by the way, you heard with your own ears, when
3 Dr. Ferrara played the actual melodies of the two songs —
4 contrary to the purposefully misleading testimony of
5 Dr. Stewart about pitch sequences — just how different the
6 melodies of these two songs are.

7 I will go through Dr. Stewart's testimony in some
8 detail in a little while, and I will compare that testimony to
9 both the testimony of Ed Sheeran and Dr. Ferrara. I think you
10 all know, as Dr. Ferrara demonstrated, Dr. Stewart was not here
11 to tell you the truth; he was not here to present you with
12 honest musicological information; he was here to mislead you.

13 And so the undisputed evidence presented to you shows
14 that nothing in "Thinking Out Loud" came from or was influenced
15 by or derived from "Let's Get It On." Ed Sheeran and Amy Wadge
16 wrote "Thinking Out Loud" on their own, just as they have
17 written many, many songs before that. "Thinking Out Loud" was
18 their original creation.

19 And this proof of independent creation is also
20 supported by the evidence of just how common this chord
21 progression and anticipation technique is, how both Ed and Amy
22 have used them before, and how one of Ed's greatest influences,
23 Van Morrison, utilized the same and similar elements in at
24 least seven songs.

25 The unrebutted evidence of independent creation

N531GRI2

Summation - Ms. Farkas

1 standing alone is enough to support a verdict rejecting the
2 claim of infringement in this case, and that is without even
3 considering all of the evidence we provided to you, which I
4 will discuss in detail in a few minutes, which shows that not
5 only are these two songs very different, lyrically and
6 melodically, but even their chord progressions and the
7 anticipation used in countless songs, before "Let's Get It On"
8 and after "Let's Get It On," are different. In fact, as you
9 heard from Dr. Ferrara, the evidence in this case so clearly,
10 unequivocally, and overwhelmingly is contrary to the
11 plaintiff's claim that it should have never been brought. And
12 I'll discuss this evidence with you now.

13 The second thing I told you that we would prove is
14 that the only thing in these two songs that are at all similar
15 are basic musical building blocks that have been used time and
16 time again in so many songs — songs that were written before
17 "Let's Get It On" and songs that continued to be written after
18 "Let's Get It On." The evidence here shows that these songs
19 are entirely different. We have different lyrics, we have
20 different melodies, we have different structures. They're
21 completely different songs. Dr. Ferrara was unequivocal about
22 those differences, and he demonstrated them for you. Ed
23 Townsend did not create any of these basic musical building
24 blocks, but he was absolutely free to use them; and Ed Sheeran
25 and Amy Wadge too did not create these musical building blocks

N531GRI2

Summation - Ms. Farkas

1 on their own, but they too were absolutely free to use them.
2 No one owns them.

3 And what are these musical building blocks? A
4 frequently used chord progression and the rhythm of that chord
5 progression, which is known as anticipation. We said we would
6 show you that these are two frequently used musical elements
7 that even the plaintiffs agree were not created by or capable
8 of being exclusively owned by Ed Townsend, but instead are
9 exceedingly common, basic musical building blocks, that no one
10 can own -- not plaintiffs, not Ed Sheeran, not anyone. In
11 fact, the judge has already ruled that both of these elements
12 are free for all to use.

13 And the third thing we said we would prove to you was
14 that not only are the chord progressions and anticipation
15 commonplace and unprotectable individually but that "Let's Get
16 It On" was not the first to combine these elements. These two
17 elements were used in at least eight songs created before
18 "Let's Get It On" and after "Let's Get It On," and Dr. Stewart
19 did not dispute a single one of them.

20 Ed Townsend was not the first songwriter to use the
21 chord progression he used in "Let's Get It On;" Ed Townsend was
22 not the first songwriter to use the specific anticipation he
23 used in "Let's Get It On;" and Ed Townsend was also not the
24 first songwriter to combine these two elements in exactly the
25 same way he did in "Let's Get It On." This combination was not

N531GRI2

Summation - Ms. Farkas

1 original to "Let's Get It On."

2 Now did the plaintiffs provide you with any evidence
3 to the contrary? No. In fact, consistent with the judge's
4 rulings in this case, they admitted that the chord progression
5 was commonplace and preexisted "Let's Get It On" and admitted
6 that the anticipation was commonplace and preexisted "Let's Get
7 It On." And they admitted that there were eight songs prior to
8 "Let's Get It On" that combined both the same chord progression
9 and the same anticipation that Ed Townsend used in "Let's Get
10 It On." Some of these were by Mr. Sheeran's favorite — one of
11 his favorite artists, Van Morrison.

12 So what do the plaintiffs do to try and justify having
13 brought this case? First, they point to what they have labeled
14 a confession, a smoking gun. And what is this smoking gun?
15 It's a video of Ed Sheeran mashing up a few seconds of the
16 lyrics to "Let's Get It On" played over the chords of "Thinking
17 Out Loud." You heard Ed Sheeran's testimony on this one
18 performance. You heard him say that he had read somewhere that
19 these two songs shared a similar chord progression and so he
20 did a mashup one night. That's plaintiff's confession? Their
21 smoking gun? You heard Ed testify that he's performed
22 countless mashups live, mashups of "Thinking Out Loud" with
23 other songs, like "Crazy Love" and "I Will Always Love You,"
24 mashups of his other songs with songs of Stevie Wonder,
25 Blackstreet, Nina Simone, and others. If mashup or medley or

N531GRI2

Summation - Ms. Farkas

1 — if you choose to accept Dr. Stewart's terminology —
2 interpolation of two or more songs played over the same chords
3 were a confession, then every performer who mashes up songs is
4 confessing to something they never did. The Axis of Awesome,
5 whose video you saw when they played about 50 songs over the
6 same chord progression, would be facing about 50 separate
7 lawsuits for infringing 50 different songs, and Ed Sheeran
8 would have confessed to infringing every song you saw him mash
9 up. And I think he said it best — if he had taken "Let's Get
10 It On" in creating "Thinking Out Loud," he would have had to
11 have been a fool to stand up in front of 20,000 people and mash
12 up the two songs.

13 Simply put, plaintiff's smoking gun was shooting
14 blanks. Their confession assertion is plain nonsense, nothing
15 more and nothing less.

16 What else did plaintiffs offer to you as a
17 justification for bringing this claim? As I will explain to
18 you shortly, they had their expert, Dr. Stewart, who pretended
19 there are supposed melodic similarities in the two songs.
20 First of all, as you heard from Dr. Ferrara, and as he
21 documented in his testimony, what Dr. Stewart told you are
22 similar melodies are not melodies at all, they are pitch
23 sequences, which are not copyrightable to begin with.
24 Dr. Stewart even admitted that pitch sequences are not melody,
25 they're just sounds devoid of duration and metric placement,

N531GRI2

Summation - Ms. Farkas

1 and thus there's no actual evidence of any similarity in the
2 melodies of these two songs because Dr. Stewart, having only
3 analyzed pitches, provided no such evidence and plaintiffs
4 provided no other witness other than Ms. Griffin, who had no
5 information at all to provide you that bears on this case.
6 Pitches are not melody. There's no dispute about that.

7 And the uncontradicted evidence in the record is that
8 these pitch sequences are different, even after Dr. Stewart
9 purposefully manipulated them, which I will discuss in more
10 detail in a few minutes. And Dr. Ferrara showed you exactly
11 how Dr. Stewart altered the actual notes in "Thinking Out Loud"
12 to make it appear that more pitches lined up than actually line
13 up. But they were still completely different; and again, they
14 were pitches, not melody.

15 Again, plaintiff provided you with no evidence —
16 nothing — that compared the melodies of these two songs.
17 Dr. Ferrara played for you the actual melodies as they appear
18 in each song. Ed Sheeran played for you his song, not as
19 manipulated and altered by Dr. Stewart but his actual song as
20 recorded and as he has performed it countless times. And you
21 could hear with your own ears how these melodies sound when
22 played. They're not remotely similar.

23 I'm now going to walk you through the evidence in this
24 case piece by piece. And as I said, we proved to you what I
25 said in my opening we would prove. The evidence in this case

N531GRI2

Summation - Ms. Farkas

1 leads to only one possible conclusion -- Ed Sheeran and Amy
2 Wadge independently created "Thinking Out Loud," and they did
3 not copy in any way "Let's Get It On." The songs are very
4 different songs, and the only thing they share is a commonplace
5 and frequently used chord progression and anticipation that
6 were not created by Ed Townsend, not original to "Let's Get It
7 On," and which are freely available to be used by all
8 songwriters.

9 So first, let's talk more about the undisputed
10 evidence showing that "Thinking Out Loud" was independently
11 created.

12 You heard from Ed Sheeran, you heard from Amy Wadge --
13 the only two people who were there when "Thinking Out Loud" was
14 created. And I told you that the only evidence on independent
15 creation would come from them and that it would be unrebutted.
16 And I believe I kept my word. And as you will recall, just as
17 I told you in my opening, the plaintiff, Ms. Griffin, admitted
18 that she had no knowledge as to how Ed Sheeran and Amy Wadge
19 came to write "Thinking Out Loud." She wasn't there. She
20 didn't know their musical influences. She had no evidence at
21 all that "Let's Get It On" had anything to do with the creation
22 of "Thinking Out Loud." In fact, she only told you what she
23 believed or wanted to believe, not what she knows. The only
24 evidence at all, again, as I said in my opening, is what would
25 be provided to you by Ed Sheeran and Amy Wadge. And

N531GRI2

Summation - Ms. Farkas

1 importantly, Ms. Griffin also admitted that she was not there
2 when Ed Townsend wrote "Let's Get It On." She had no idea what
3 his musical influences were. And so just as I told you in my
4 opening, plaintiffs did not provide you with any evidence about
5 the creation of "Let's Get It On" or "Thinking Out Loud."

6 Ed Sheeran and Amy Wadge both testified about how Amy
7 came to Ed's house for a visit, how they stayed up late the
8 night before "Thinking Out Loud" was created and talked about
9 Amy's mother-in-law, who was dying, and soon after passed away;
10 and you heard how Ed's grandfather had recently passed away;
11 and you heard about how these friends talked about what it must
12 be like to spend your whole adult lives with a loved one, to be
13 in a loving relationship for that many years, and then what it
14 must feel like to go on without that person, how lost Ed's
15 grandmother was without Ed's grandfather. And you heard from
16 both Ed and Amy that it was this conversation that inspired
17 "Thinking Out Loud."

18 The plaintiffs have tried to suggest that this
19 conversation only impacted the lyrics to "Thinking Out Loud"
20 and that they don't make a claim as to the lyrics. They
21 suggest that lyrics should be creatively divorced from the
22 melodies that were created simultaneously that night and which
23 accompany them. This is not how the creative process works and
24 certainly not how this song was created. As Ed and Amy
25 explained to you, the songwriting process is collaborative.

N531GRI2

Summation - Ms. Farkas

1 All of the elements of the song were part of the same creative
2 process for "Thinking Out Loud." The chords, the rhythm, the
3 melodies, the lyrics, they were all happening at once.

4 Going back to the creation, you heard from Ed and Amy
5 that the next day they were getting ready to go out for dinner
6 with Ed's parents, and while Ed went up to take a shower, Amy
7 did what comes naturally to her; she picked up Ed's guitar.
8 She started strumming some basic chords while humming or
9 singing some melody and some lyrics over the chords. And the
10 evidence in this case establishes that the chords Amy was
11 playing have been used in countless songs before and after
12 "Let's Get It On." And those were the same chords that were
13 used in "Thinking Out Loud." And you heard that the exact same
14 chord progression that Amy played that evening, the chord that
15 is in "Thinking Out Loud," is in another song she released
16 before "Thinking Out Loud," a song called "Better Than Me."
17 Amy also testified that she was performing "Better Than Me" at
18 gigs around the same time that she and Ed wrote "Thinking Out
19 Loud." And as I told you in my opening, Ed and Amy both
20 testified that after Ed got out of the shower, he heard Amy
21 strumming the guitar and mumbling some melody and lyrics over
22 the chords, and you heard from both of them how the song came
23 together that evening, both before dinner with Ed's parents and
24 after. Ed and Amy both testified that, fueled by their
25 real-life experiences, they built off that theme, and by

N531GRI2

Summation - Ms. Farkas

1 midnight that night, they had written "Thinking Out Loud."

2 There's no dispute in this case that both Ed and Amy
3 were aware of "Let's Get It On." They've never denied it.
4 That knowledge is known as access. But all of the access in
5 the world is not copying. Ed and Amy have had access to
6 thousands and thousands of songs, just like we all have. Does
7 that mean they copied all of those songs? Of course not.

8 And as you heard, while Ed and Amy were both certainly
9 aware of "Let's Get It On," it was not a song they knew well.
10 Ed and Amy testified clearly and unequivocally that "Let's Get
11 It On" never crossed their mind the day they wrote "Thinking
12 Out Loud." They were writing a song about being with the love
13 of your life until you were old, until your legs don't work
14 like they used to before, until your hair falls out and your
15 memory fades. They were not writing a song about getting it on
16 — not musically, not lyrically. The undisputed evidence you
17 have heard is that Ed and Amy wrote "Thinking Out Loud" the
18 same way they had written dozens of songs before that one —
19 collaboratively and within a few hours.

20 And this undisputed evidence of independent creation
21 is entirely consistent with the other evidence in this case —
22 the ubiquity of the commonplace chord progression; the fact
23 that Amy had used this chord progression with anticipation in a
24 song that she was performing around the same time; that Ed had
25 used anticipation in 20 songs before "Thinking Out Loud"; then

N531GRI2

Summation - Ms. Farkas

1 of them having the exact same anticipation; that Van Morrison,
2 one of Ed's significant musical influences, had several songs,
3 including some before "Let's Get It On" was created, "Crazy
4 Love" and "Tupelo Honey," that used anticipation and a similar
5 chord progression. And given the commonplace nature of the
6 elements that we're talking about here, elements used in no
7 less than 33 songs before "Let's Get It On" and in another 47
8 songs after "Let's Get It On," including several Van Morrison
9 songs written before and after "Let's Get It On," it's not
10 particularly surprising that Ed and Amy incorporated an
11 exceedingly common chord progression and an exceedingly common
12 rhythmic pattern, things that both Ed and Amy had used in prior
13 songs of theirs, in "Thinking Out Loud." These chords and the
14 rhythmic pattern of anticipation were basic to the tool kit of
15 all songwriters, including Ed and Amy.

16 You heard about Van Morrison being a musical influence
17 of Ed's. "Thinking Out Loud" was in the acoustical and love
18 song style of a Van Morrison song, and like dozens and dozens
19 of other songs, it shared similar chord progressions. And you
20 heard from Ed Sheeran that after they wrote and recorded
21 "Thinking Out Loud," Ed's label and others gave it the nickname
22 "The Van Song." They called it "The Van Song" because it
23 seemed to be in the style of Van Morrison. It was, as I said,
24 a song about love, and it used an acoustic guitar. Was
25 "Thinking Out Loud" copied from any Van Morrison song? No.

N531GRI2

Summation - Ms. Farkas

1 And no one, other than the plaintiffs here at trial, have ever
2 suggested it was, and that suggestion was just a distraction as
3 it has nothing whatsoever to do with any claim of the
4 plaintiffs.

5 Ed showed you how "Thinking Out Loud" evokes the style
6 of Van Morrison's songs but was not copied from any Van
7 Morrison song. We played for you "Crazy Love." "Crazy Love"
8 was created before "Let's Get It On." And "Crazy Love," like
9 so many songs, has a similar chord progression — three of the
10 four chords — as "Thinking Out Loud." It was released in
11 1970, three years before "Let's Get It On." And of course a
12 chord progression that's in the toolkit of all songwriters is
13 also free for all songwriters to use. And nowhere found in
14 "Let's Get It On."

15 Ed also showed you a few other Van Morrison songs,
16 including "Tupelo Honey," also released before "Thinking Out
17 Loud," "Have I Told You Lately," and "Why Must I Always
18 Explain?" All of them were released before "Thinking Out
19 Loud." Ed performed these songs for you. He segued from
20 "Thinking Out Loud" to "Crazy Love" and back again. He segued
21 back and forth from "Tupelo Honey" to "Thinking Out Loud" and
22 back again. And it's easy to do because singing lyrics from
23 different songs over similar chord progressions is common for
24 performers to do in concert. And as you heard from Ed Sheeran,
25 Van Morrison loved "Thinking Out Loud," and contrary to

N531GRI2

Summation - Ms. Farkas

1 plaintiff's attempt to distract you, Van Morrison did not for a
2 second, unlike the plaintiffs here, accuse Ed of taking from
3 him. He understood, as these plaintiffs don't, that the chord
4 progression in his songs, just like the chord progressions in
5 many, many other songs, including "Let's Get It On," were not
6 created and are not owned by him or anyone but are musical
7 building blocks freely available to use by all songwriters.
8 They are the scaffolding on which music is built.

9 And if the use of commonplace chord progressions in a
10 song were evidence of copying, then Ed Townsend copied from
11 many earlier songwriters who used the same chords and the same
12 anticipation in their songs. He could have been accused of
13 copying "Earth Angel" and "Tears On My Pillow" when he wrote
14 "For Your Love." But if Ed Townsend copied from these earlier
15 songs, he was free to do so, because no one owns these chords
16 and no one owns the anticipation, and no one made any claim
17 that Ed Townsend infringed any of these songs. And the
18 plaintiffs are now not entitled, 50 years after "Let's Get It
19 On" was written, to withdraw these basic musical building
20 blocks from the toolkits of all songwriters and claim exclusive
21 ownership over something that preexisted "Let's Get It On,"
22 that Ed Townsend did not create, did not own, and which no
23 songwriter owns. None of this was original to "Let's Get It
24 On."

25 "Let's Get It On" was not in the repertoire of Ed and

N531GRI2

Summation - Ms. Farkas

1 Amy. It was not in their minds when they wrote "Thinking Out
2 Loud." It was not a song they knew well enough to copy if they
3 had wanted to copy it. And they did not copy it — not
4 consciously, not unconsciously, and not at all. In fact, both
5 Ed and Amy testified that at the time they wrote "Thinking Out
6 Loud," they did not even know what the chords of "Let's Get It
7 On" were; that if someone asked them to play these chords, they
8 wouldn't even know what they were or how to play them.

9 Plaintiffs have offered nothing more than
10 Ms. Griffin's belief that "Let's Get It On" was copied and
11 Dr. Stewart's purposeful distortion of pitch sequences to
12 create the illusion that there was some alleged similarities in
13 the melodies of both songs, but neither Dr. Stewart's
14 distortions nor plaintiff's unsupported speculation comes close
15 to overcoming the undisputed evidence of Amy and Ed's
16 independent creation of "Thinking Out Loud" based on their own
17 inspirations and their own personal musical toolkits. This is
18 the undisputed evidence you heard about the creation of
19 "Thinking Out Loud." Independent creation is not copying.

20 Let's break it down a bit more. Let's look at what
21 plaintiffs claim was supposedly copied from "Let's Get It On."

22 What is the undisputed evidence about the chord
23 progressions? First of all, they're different in the two
24 songs. They are commonly used building blocks in music, like
25 the ABCs, the scaffolding of music, and the judge has already

N531GRI2

Summation - Ms. Farkas

1 ruled that the "Let's Get It On" chord progression is
2 commonplace and unprotectable. And so is the anticipation.
3 We'll get to that after.

4 You've heard a lot about these two different chord
5 progressions at issue. The two chord progressions at issue are
6 different. Plaintiff's expert Dr. Stewart knows they are
7 different and admits they are different. And even if they were
8 the same — and they're not — Ed Townsend did not create this
9 chord progression. He does not own it. No one owns it.

10 So what did Dr. Stewart do to try to mislead you about
11 the chord progressions? Dr. Stewart testified under oath that
12 in the first 24 seconds of "Thinking Out Loud" the chord
13 progression is the same as "Let's Get It On." It is not. Let
14 me be clear. That sworn testimony was contrary to
15 Dr. Stewart's own prior report and his sworn declaration in
16 which he transcribed the first 24 seconds of "Thinking Out
17 Loud" using as its second chord the D/F sharp. It is also
18 contrary to the testimony of Dr. Ferrara and Ed Sheeran, the
19 one person who knows what he played on guitar. And you heard
20 from Mr. Sheeran, the person who was there with Amy when
21 "Thinking Out Loud" was created, and who recorded the song and
22 has performed it countless times, there's nothing different
23 about the first 24 seconds of "Thinking Out Loud." It's simply
24 a fabrication by Dr. Stewart, contradicted by Dr. Stewart's own
25 pretrial transcriptions.

N531GRI2

Summation - Ms. Farkas

1 So it is clear and undisputable, Dr. Stewart was not
2 telling you the truth when he said that "Thinking Out Loud" has
3 a different chord progression in the first 24 seconds of the
4 song. It was not the same as "Let's Get It On." There is no
5 I-iii-IV-V chord progression in "Thinking Out Loud." So why
6 did he make up this story? Because without it, he would have
7 to admit that the LGO chord progression is nowhere to be found
8 in "Thinking Out Loud." But even if Dr. Stewart were correct
9 — and he's not — it still would not matter because this chord
10 progression is so common, and it was not original to "Let's Get
11 It On."

12 I will talk about the many, many other
13 misrepresentations of Dr. Stewart when I discuss his supposed
14 pitch similarities masquerading as melodic similarities.

15 So now that we've gotten one of Dr. Stewart's more
16 offensive misrepresentations out of the way, the undisputed
17 evidence shows that the chord progressions in each song are
18 different, and common. Indeed, the judge has already ruled
19 that these chord progressions are commonplace and
20 unprotectable. And as Dr. Ferrara showed you, they are exactly
21 that — commonplace, unprotectable, and they were used in
22 dozens of songs before "Let's Get It On."

23 In fact, as Dr. Ferrara documented for you, it is
24 undisputable that the I-iii-IV-V chord progression in "Let's
25 Get It On" is so basic that it has been used by songwriters in

N531GRI2

Summation - Ms. Farkas

1 no less than 33 songs before "Let's Get It On" used this chord
2 progression. So no one — not Ed Townsend, not Ms. Griffin,
3 not Ed Sheeran, not anyone — can own it. Instead, this
4 I-iii-IV-V chord progression is free for everyone to use.

5 You heard from Dr. Lawrence Ferrara, a highly
6 respected, full professor of music for over 30 years at New
7 York University, and an expert in this field. And I think you
8 saw for yourself the difference between Dr. Stewart and
9 Dr. Ferrara. Dr. Ferrara was here to inform you, to help you
10 understand the musicological evidence. He was not here to
11 mislead you, confuse you, or distort the musicological
12 evidence. Dr. Ferrara testified at length regarding the
13 claimed musical similarities between the songs, and he told
14 you, clearly and without hesitation, that these songs are
15 completely different, and there was no evidence to support a
16 claim of copying.

17 Dr. Ferrara showed you that Ed Townsend was hardly the
18 first person to use this chord progression. Indeed,
19 Dr. Ferrara testified that he found over 100 songs that contain
20 the chord progressions at issue in this case. Over 100. And
21 again, no less than 33 before "Let's Get It On." This chord
22 progression was not original to "Let's Get It On."

23 You saw the list. Everyone from Buddy Holly to The
24 Beach Boys to the Bee Gees to The Beatles to Elton John had
25 used this chord progression before Ed Townsend used it in

N531GRI2

Summation - Ms. Farkas

1 "Let's Get It On." Ed Townsend did not need The Beatles'
2 permission or the Bee Gees' permission or The Beach Boys'
3 permission or Elton John's permission to use this chord
4 progression in "Let's Get It On." It was freely available to
5 all of them and to him, just as it is freely available to Ed
6 Sheeran and Amy Wadge.

7 Did ABBA or Natalie Cole or Van Morrison or Green Day
8 or Jack Johnson have to get Ed Townsend's permission to write
9 any of their songs that appear on this list? Of course not.
10 But if you're to accept plaintiff's claim, hereafter, everyone
11 would have to get the permission of Ms. Griffin to use a chord
12 progression that has been in common use for decades,
13 preexisting "Let's Get It On" — in fact, not only the "Let's
14 Get It On" chord progression but the different "Thinking Out
15 Loud" chord progression too, chord progressions that Ed
16 Townsend didn't even create that preexisted "Let's Get It On"
17 and has been used in nearly 70 songs since "Let's Get It On"
18 was written — without any claim ever having been made. And no
19 claim should have been made either. Again, it is undisputed
20 that the chord progression in "Thinking Out Loud" is different.
21 So how can these plaintiffs seize control of the "Thinking Out
22 Loud" chord progression on top of the "Let's Get It On" chord
23 progression? They can't, and you should tell them they can't.
24 No one can or should own any chord progression.

25 As Dr. Ferrara showed you, the I-iii-IV-V chord

N531GRI2

Summation - Ms. Farkas

1 progression that Ed Townsend used in "Let's Get It On" is so
2 common that it is taught in basic, how to play guitar and piano
3 books. We showed you that in one of these books, a piano
4 instruction book published in 1967, six years before Ed
5 Townsend wrote "Let's Get It On," that this chord progression
6 is one of the ten popular rock and roll chord progressions for
7 the piano. What could be clearer evidence that Ed Townsend did
8 not create this chord progression? It was not original to him.

9 Dr. Ferrara testified that chord progressions like
10 this one are a part of the songwriter toolkit. They are
11 fundamental, basic musical building blocks, like the ABCs of
12 music.

13 Now let's talk about anticipation. Plaintiffs have
14 also claimed that there is a similarity relating to the
15 harmonic rhythm, the anticipation, or syncopation that is used
16 with this exceedingly common chord progression. As you heard,
17 both Dr. Ferrara and Dr. Stewart agree that anticipation has
18 been used in music for hundreds of years. Ed Townsend did not
19 create anticipation. And consistent with this undisputed fact,
20 the Court has ruled that anticipation is commonplace and
21 unprotectable. The plaintiffs do not own anticipation and
22 cannot demand that no one but them can use it.

23 The undisputed evidence shows that Ed Sheeran himself
24 used this commonplace rhythmic device in 20 of his own songs
25 before writing "Thinking Out Loud," and that he has used

N531GRI2

Summation - Ms. Farkas

1 anticipation of the second and fourth chords the same exact way
2 as in "Thinking Out Loud" in 10 of them. These are all before
3 "Thinking Out Loud." This is not something he took from "Let's
4 Get It On." It is part of Ed Sheeran's toolkit in writing
5 songs, and it should remain in the toolkit of songwriters for
6 the future.

7 Dr. Stewart again tried to mislead you,
8 misrepresenting that — Dr. Ferrara's analysis of the harmonic
9 rhythm. He claimed that Dr. Ferrara identified six chords
10 instead of four. Dr. Ferrara debunked that in his testimony,
11 showing exactly how Dr. Stewart was misrepresenting his
12 analysis.

13 Dr. Stewart also invented another fiction by claiming
14 that if you double the tempo, it removes the differences.
15 Dr. Ferrara explained to you what Dr. Stewart suggested not
16 only defies musicological analysis but if you accept the notion
17 that changing the harmonic rhythm somehow makes them the same,
18 which is of course nonsense, it's actually an admission that
19 they're different. And they are different. Dr. Ferrara showed
20 you that the harmonic rhythm, the anticipation used in
21 "Thinking Out Loud," is different than the harmonic rhythm used
22 in "Let's Get It On" in several ways. And Dr. Ferrara also
23 showed you there are many songs written before "Let's Get It
24 On" that use the exact same anticipation of the second and
25 fourth chords. And importantly, some of those songs also have

N531GRI2

Summation - Ms. Farkas

1 the exact same chord progression as "Let's Get It On." And as
2 you heard from both Amy Wadge and Dr. Ferrara, the undisputed
3 evidence shows that Amy Wadge had co-written a song before
4 "Thinking Out Loud" that used the very same chord progression
5 used in "Thinking Out Loud," and anticipation in a similar
6 manner to "Thinking Out Loud" — "Better Than Me".

7 In short, contrary to the — to Dr. Stewart's
8 misguided attempt to pretend that the anticipation in the both
9 songs is the same, they are in fact different. And perhaps
10 more importantly, anticipation is a centuries-old musical
11 building block, not created by Ed Townsend, not exclusively the
12 property of Ms. Griffin, and freely available to all
13 songwriters to use now and forever.

14 I want to briefly address a point made by plaintiffs
15 about Dr. Stewart's testimony that apparently 70 percent of
16 "Thinking Out Loud" is derived from "Let's Get It On." He
17 provided no rationale for this number, and there is none. The
18 lyrics of "Let's Get It On" are not at issue, and lyrics are
19 commonly accorded 50 percent of the value of any song. The
20 melodies are completely different. Entire sections of the song
21 are not even at issue. That leaves the chord progression and
22 anticipation that Ed Townsend did not create and cannot own,
23 and random pitches that no one can own. So instead of
24 Dr. Stewart's 70 percent, the actual percentage of relevant
25 similarities is actually 0 percent.

N531GRI2

Summation - Ms. Farkas

1 Second, Ms. Viker asked Amy Wadge if Mr. Sheeran paid
2 songwriters, perhaps in an attempt to mislead you. The
3 question misrepresents how writers are compensated.
4 Collaborating songwriters don't pay a set fee or make some type
5 of payment to their co-writers. Instead they typically share
6 songwriter credit on songs they create together, and how those
7 splits are determined are the result of a discussion among the
8 songwriters. They then receive their piece of royalties based
9 on the earnings of the song, if anything, as they are
10 generated. Songwriting is a risky profession. As you have
11 heard, Ed and Amy have each written thousands of songs.
12 Precious few get recorded and released and generate money for
13 their songwriters, and fewer still are successful. But
14 songwriters don't get paid any other way. It's just — it's
15 just not how it works.

16 Dr. Stewart also testified about three supposed
17 melodic similarities between "Thinking Out Loud" and "Let's Get
18 It On." And I told you in my opening that the plaintiffs would
19 not be able to prove that there were any melodic similarities
20 between the two songs because they were not remotely
21 melodically similar. And in fact, just as Dr. Ferrara
22 explained to you, Dr. Stewart did not actually present any
23 evidence regarding the melodies of the two songs. And the
24 reason he avoided it should be fairly obvious to you after
25 hearing Dr. Ferrara play them. As your own ears have told you,

N531GRI2

Summation - Ms. Farkas

1 the actual melodies, not Dr. Stewart's pitches, are very, very
2 different.

3 Let's start with what's undisputed. As Dr. Ferrara
4 showed you, Dr. Stewart's own slides defined melodies to
5 include the following: "The Harvard and Oxford dictionaries of
6 music further explain that along with pitch, duration (rhythm)
7 is an essential element in the formation and recognition of
8 melod[ies]. . ."

9 Without rhythmic duration and metric placement, a
10 sequence of pitches is not melody. A pitch is just a sound
11 devoid of duration, devoid of placement in music, and devoid of
12 relationship to any other note. Pitches are not copyrightable,
13 and as I said, they're just sounds. Pitches are not melody.
14 Dr. Stewart admitted that he did not analyze the rhythmic
15 duration of the notes in the two songs. He admitted that he
16 did not analyze the metric placement of the notes in the two
17 songs. He did not do so because he knew it would reveal the
18 very differences in the melodies of the songs that he was
19 intent on concealing. So instead of melody, Dr. Stewart tried
20 to mislead you with charts showing only the supposed pitch
21 sequences as they appear in three sections of melody that he
22 claimed were similar in the two songs.

23 But even the pitch sequences identified by Dr. Stewart
24 are very different. I'm sure you'll recall, Dr. Stewart tried
25 to suggest that pitches did not line up — that the pitches

N531GRI2

Summation - Ms. Farkas

1 that did not line up between the two songs could nevertheless
2 be counted as similar, so even pitches that appear in different
3 places in the two songs, Dr. Stewart still counted as being
4 matched in order to exaggerate the supposed small number of
5 similar or common pitches between the songs.

6 But that was not all he did. He added notes that
7 don't exist in "Thinking Out Loud," and then, depending on when
8 it helped him match the pitches or hindered his matching, he
9 either ignored them or included them in his misrepresented
10 lineup of pitches to manufacture pitch similarities that simply
11 don't exist. Dr. Ferrara's accurate transcriptions showed that
12 these notes don't exist; the published sheet music show that
13 these notes don't exist; and of course we have Mr. Sheeran's
14 testimony that they don't exist. After all, he wrote the song,
15 with Amy, and he certainly has performed it many times. He
16 would know.

17 Dr. Ferrara showed you that what Dr. Stewart was up
18 to. Let's just — if you just take one example of Melody A, or
19 the opening melody, even if we accepted Dr. Stewart's pitch
20 charting as correct — and the evidence shows it is not — only
21 five of 14 pitches line up. Five. But even this is an
22 exaggeration, because three of the supposedly five similar
23 pitches, Dr. Stewart treats an F and an F sharp as the same
24 pitch. They're not the same pitch. These are blue notes that
25 are in "Let's Get It On," that give it that bluesy sound that

N531GRI2

Summation - Ms. Farkas

1 Dr. Ferrara talked about, and as Dr. Ferrara told you, there
2 are no blue notes in "Thinking Out Loud." I'm sure you can
3 figure out that an F and an F sharp are two different notes.
4 They're different pitches. They sound different because they
5 are different. So what did Dr. Stewart do to create an
6 illusion of similarity? In addition to manufacturing grace
7 notes, he also changed the notes of "Thinking Out Loud" to put
8 in blue notes that nowhere exist in "Thinking Out Loud."

9 And I'm sure you will recall, we walked through this
10 with Dr. Ferrara, and he showed you all of the notes in blue —
11 two on each of the three lines of music that we were looking at
12 — that Dr. Stewart invented and unilaterally decided to place
13 into "Thinking Out Loud." He added six blue notes in one
14 segment of melody. He changed six of the notes of melody in
15 "Thinking Out Loud" in order to create the appearance of
16 pitches matching up when no such notes exist in "Thinking Out
17 Loud."

18 When you change the notes of the song, it's no longer
19 the same song; it's something else. What Dr. Stewart did was
20 to change the melody of "Thinking Out Loud." I don't think I
21 can improve upon Mr. Sheeran's reaction to what he did. It was
22 not "Thinking Out Loud." So when we remove these objectively
23 different pitches created by Dr. Stewart's invention of blue
24 notes, only two pitches line up. And they're scattered. This
25 is just one example of how Dr. Stewart altered "Thinking Out

N531GRI2

Summation - Ms. Farkas

1 Loud" to manufacture supposed similarities that in fact do not
2 exist. He removed a lyric here, he tried to get you to
3 disregard pitches that he decided to put in a smaller font and
4 put in parentheses, claiming that they're inaudible. You
5 remember the two pitches, two No. 2s in parentheses?
6 Dr. Stewart does not get to determine which notes count in the
7 deposit copy and which ones don't. They all do.

8 What Dr. Stewart did is patently improper. And
9 perhaps I can give you a plain-English example that will help
10 make clearer just how improper Dr. Stewart's attempt to count
11 up supposed common pitches to suggest supposed melodic
12 similarities that do not exist.

13 The words "rate" and "accelerate" both contain the
14 letters R-A-T-E; and "ire" and "conspire" both contain the
15 letters I-R-E; "bus" and "business" both contain the letters
16 B-U-S. These words, as is perfectly obvious, are completely
17 different and have completely different meanings. And I'm sure
18 you can think of many other examples. And to make it simple, I
19 have used letters that make up words, but I could have just as
20 easily shown you a series of letters that don't even make up a
21 word, just like Jumble in the newspaper. Letters of the
22 alphabet are not copyrightable. They are basic building blocks
23 of words. And individual words are also not protectable. You
24 need to combine words into sentences to approach something that
25 might be copyrightable. And that is the way it is with

N531GRI2

Summation - Ms. Farkas

1 pitches. They're like letters in the alphabet. Although they
2 require more than a coherent — they require an ear-pleasing
3 order, they also require more than just letters do because they
4 require a specific rhythmic duration and metric placement in
5 order to create an ear-pleasing melody. The point of this is
6 to show you how Dr. Stewart was trying to mislead you with
7 pitches. Even though the words I mentioned have some of the
8 same letters, the words are totally different words. So too
9 are the fragmentary pitches referenced by Dr. Stewart. They're
10 not melody; they're just pitches.

11 The evidence shows that Dr. Stewart's three sets of
12 pitch sequences were not only completely different from each
13 other but they're not even melodies. No one can own a series
14 of pitches, and certainly not a series of different pitches.
15 And once the actual melodies are analyzed, as Dr. Ferrara did
16 for you with precision and care, it is clear that there is
17 nothing remotely similar or meaningful about the melodic
18 segments placed at issue.

19 I now want to turn to what I would call the
20 plaintiff's "Hail Mary" attempt to manufacture a claim.
21 Because it's undisputed the chord progression is commonplace,
22 and it's undisputed that anticipation is commonplace. And
23 there is no evidence of melodic similarities here, as I just
24 went through with you. In fact, you were able to hear with
25 your own ears how different they are. So the plaintiffs have

N531GRI2

Summation - Ms. Farkas

1 advanced a claim, what is called a selection and arrangement
2 claim. And what is that? It's a claim that says, okay, we
3 know that the musical elements I'm claiming are commonplace and
4 unprotectable, but I've combined them with what Dr. Stewart
5 falsely labels melodies in some new, novel, unique way that has
6 never been done before, and that combination can be protectable
7 even if each of the elements are not. That's their claim.

8 Copyright law does not want commonplace elements to be
9 removed from the toolkits of all songwriters. Copyright law
10 wants new works to be created based on musical building blocks
11 that are available to all of us. So when someone claims that
12 they've created a new and novel, original selection and
13 arrangement of musical elements, the law creates a very high
14 bar for protection. The combination has to consist of numerous
15 elements. It has to be new, novel, original, and perhaps most
16 importantly here, the combination in both works has to be
17 identical or virtually identical. It must be very, very close,
18 not just similar, and not substantially similar. Again, a very
19 high bar to prevent commonplace and unprotectable elements from
20 being removed from usage by all writers.

21 So let's examine the evidence relating to plaintiff's
22 selection and arrangement claim.

23 As I said, the chord progressions in the two songs are
24 undeniably different. Second, as Dr. Ferrara showed you —
25 again, contrary to Dr. Stewart's assertions — the anticipation

N531GRI2

Summation - Ms. Farkas

1 of the chord progressions in the two songs is also different.
2 And third, while the plaintiffs, until Dr. Stewart's testimony
3 to you last week, had claimed that their third element in their
4 selection and arrangement claim was the key signature of both
5 songs — which, by the way, is also different — during his
6 testimony, for the first time since plaintiff's lawsuit was
7 filed in 2017, Dr. Stewart and the plaintiffs made a wholesale
8 change to their election and arrangement claim, abandoned key
9 signature, and swapped in the supposed melodies as part of
10 their selection and arrangement claim.

11 So while we would suggest to you that these three
12 elements are not sufficiently numerous to support a selection
13 and arrangement claim, even if you believe the three was enough
14 and it's contrary to the dictionary definition of "numerous,"
15 plaintiffs still cannot support a selection and arrangement
16 claim for two more powerful reasons. First, as Dr. Ferrara
17 showed you, the combination of the chord progression and
18 anticipation was used in multiple songs before "Let's Get It
19 On." It was not new; it was not novel; it was not original to
20 "Let's Get It On." Even Dr. Stewart was forced to admit that
21 there are two versions of "Georgy Girl" that have the same
22 combination of the elements at issue, and Dr. Stewart also
23 admitted that "You Lost the Sweetest Boy" has the same
24 combination. And Dr. Stewart did not dispute or even address
25 the other six examples.

N531GRI2

Summation - Ms. Farkas

1 In fact, "You Lost the Sweetest Boy" also has some of
2 the same pitch sequences that Dr. Stewart put into issue, but
3 of course pitch sequences are not melody and are not
4 protectable. And beyond these songs, Dr. Ferrara also
5 testified there are at least six songs that have the same
6 combination of the very chord progression and anticipation of
7 the second and fourth chords that plaintiffs claim in this
8 case. None of this was disputed by Dr. Stewart.

9 Simply put, it is undisputed that "Let's Get It On" is
10 not the first or the second or the third or the fourth song to
11 use the chord progression and the anticipation that "Let's Get
12 It On" used. The combination is not new or novel or original
13 to "Let's Get It On."

14 So now let's add in the supposed melody. As you heard
15 from Dr. Ferrara, that simply seals the death of plaintiff's
16 selection and arrangement claim. Why? Because the melodies
17 are totally different. By making the supposed melody as an
18 element of their claim, plaintiffs themselves defeat the very
19 claim that they make. The combination of the commonplace chord
20 progression with anticipation, both of which are different in
21 each work, with completely different melodies, are not
22 identical, virtually identical, or certainly not very close.
23 On the contrary, they're very different.

24 This is a case that should have never been brought.
25 Ed Sheeran and Amy Wadge should never have been subjected to a

N531GRI2

Summation - Ms. Farkas

1 claim that their song, born out of their late-night discussion
2 of Ed's grandparents' long-term love and Amy's mother-in-law's
3 impending death, was infringing. They independently created
4 their song. I am persuaded that these plaintiffs, perhaps
5 impelled by Dr. Stewart's disingenuous and half-baked analysis,
6 convinced themselves of the existence of a completely
7 commonplace chord progression, which any songwriter would know
8 belongs to no one and to everyone, was enough to justify this
9 case. They unjustly accused two dedicated and talented
10 songwriters.

11 You have the right and the opportunity, with your
12 decision in this case, to let it be known, not only to these
13 plaintiffs but to those who would pursue similar claims, that
14 no one can exclusively own commonly used chord progressions or
15 pitch sequences or harmonic rhythm. These are basic musical
16 building blocks that all songwriters now and forever must be
17 free to use, or all of us who love music will be poorer for it.

18 Before I sit down, I want to take a moment to talk
19 about how important this decision is to songwriting in general.
20 You've heard testimony about musical influences. All artists
21 are influenced by those who came before them, and that is one
22 significant way that artists are inspired to create new works
23 for all of us to enjoy. If the plaintiffs prevail in this case
24 and are found to own a chord progression that Ed Townsend
25 admittedly did not create, performed in a way that is

N531GRI2

Summation - Ms. Farkas

1 undeniably common, even though he was not the first to combine
2 these two things, does that mean that every artist who wants to
3 write a song using a chord progression has to ask themselves,
4 wait, was there ever another song that used this chord
5 progression? And how exactly do those songs play those chord
6 progressions? What if I vary it a bit? Will I still get sued?
7 Do I need to ask for permission? Is there a three or a five
8 pitch in there somewhere? Is that going to be a problem? Does
9 every artist that goes into the studio or every songwriter that
10 sits down at the piano with a guitar to write or every child
11 that's in their bedroom trying to write a song, are they unable
12 to draw from the vocabulary of musicians? Do we have to tell
13 the 11-year-old next Ed Sheeran that they better find out who
14 owns that chord progression? Or maybe if you play it this way
15 and not that way, you'll be okay, fingers crossed? We all
16 benefit from artists being free to create and build on what
17 came before them, to be inspired by the great artists that have
18 preceded them. Buddy Holly influenced The Beatles, Bob Dylan,
19 and Eric Clapton; Stevie Wonder was influenced by Ray Charles
20 and Smokey Robinson; Little Richard influenced The Beatles,
21 Otis Redding, and Prince; Ed Townsend was inspired by The
22 Penguins and doowop groups like Little Anthony and the
23 Imperials, certainly when he created "For Your Love." The list
24 can go on and on. Influences provide inspiration —
25 inspiration to build off the essential building blocks in every

N531GRI2

Summation - Ms. Farkas

1 songwriter's musical toolkit, to build off the styles and
2 contributions of these artists, and to bring all of us new
3 works of art into this world, with new spins, new perspectives,
4 new melodies, and new interpretations. Without inspiration,
5 the music will stop. If we start to dissect every song, to
6 hunt for similarities, and hand out ownership to things as
7 basic as chord progressions and the manner in which they are to
8 be performed, nothing will be left for songwriters to write.
9 Songwriters will not be inspired to create new music; rather,
10 creativity will be stifled for fear of being sued.

11 Here, it is as clear as day because every one here
12 agrees that the elements at issue are things no one can own.
13 No one can own a chord progression; no one can own the way it
14 is performed. These are the letters of the alphabet of music,
15 the scaffolding upon which all songwriters are free to build.

16 We all want songwriters and all creators to keep
17 creating. We need and benefit from what music brings to our
18 lives on a daily basis. But a ruling for the plaintiff truly
19 puts songwriters in jeopardy. If there is a finding that the
20 plaintiffs here can own this chord progression, even if this
21 chord progression with anticipation, you would be removing an
22 essential element in every single songwriter's toolkit. Is
23 that really what we want to do to music?

24 Ed Sheeran and Amy Wadge are human beings. They have
25 been dragged through this litigation and dragged through this

N531GRI2

Summation - Ms. Rice

1 trial, all the while being accused of stealing. Not only did
2 we show you that they independently created "Thinking Out
3 Loud," but we showed you that no one can own that which
4 plaintiff's entire claim is based on. No one owns chord
5 progressions, no one owns anticipation. These are entirely
6 different songs, different lyrics, different melodies,
7 different songs.

8 Plaintiff's counsel said in his opening, give credit
9 to where credit is due. Give credit to Amy, and give credit to
10 Ed Sheeran. Give them the credit that they are due for writing
11 a beautiful, emotional song that has resonated with so many
12 people.

13 I'd like to thank the jury for your time and your
14 consideration on this case. I know firsthand that jury service
15 can be a significant burden and interfere with your jobs and
16 your lives. So on behalf of Mr. Sheeran and all of the
17 defendants, we want to sincerely thank you for the time and the
18 sacrifice you have made.

19 THE COURT: Thank you, Ms. Farkas.

20 Ms. Rice?

21 MS. RICE: Ladies and gentlemen of the jury, may it
22 please the Court. My name is Keisha Rice, and I am one of the
23 counsel for the plaintiffs in this matter. And as Ms. Farkas
24 has said, we want to thank you for all the time, the
25 dedication, the patience that you've given to all of us for the

N531GRI2

Summation - Ms. Rice

1 past however many days.

2 One of the interesting things that we encounter in
3 cases like this is how the evidence is presented, and certain
4 cases get the evidence presented in a particular way, and so
5 what I would like to do today is just kind of walk you through
6 how the evidence has been presented, how we've met our burden,
7 and you'll get to learn a little bit more about burden as you
8 go through the jury instructions. All of the definitions that
9 you need will be present.

10 One of the things that I tend to — or I think that
11 most people tend to do when they're talking about what you're
12 going to experience as the jury and what we're placing in your
13 hands is that the judge really is the only person to give legal
14 definitions. And the reason that that happens is because, as
15 attorneys, we're going to naturally color how we feel that
16 particular law should be applied. So you run into a little bit
17 of a problem if you give legal definitions that aren't
18 consistent with what's in the jury instructions. So as you get
19 back there, please take a look, take your time, read the jury
20 instructions. Everything that you need will be there.

21 Mr. Ed Sheeran is a performer, first and foremost, and
22 an entertainer, and it's okay to like him. It really, really
23 is. We are here advocating for positions for law so we are not
24 here to say whether or not someone is a good or bad person.
25 However, Mr. Sheeran is counting on you to be very, very

N531GRI2

Summation - Ms. Rice

1 overwhelmed by his commercial success. In fact, he spent over
2 an hour highlighting his accomplishments with his attorneys
3 during his testimony, and he clearly has an ability to connect
4 with people, to connect with audiences, and that connection
5 relies on you being willing to overlook certain facts in this
6 case. The celebrity appreciation that he's relying on allows
7 you to determine that he is not accountable. As long as the
8 defendants can rely on misrepresentation, misdirection, the
9 defendants can attempt to ensure that you will substitute your
10 good common sense for fan admiration.

11 I'd like to illustrate to you just how much defendants
12 are relying on you to ignore your basic common sense. At the
13 beginning of this case, the judge specifically told you that
14 this was a case about two pieces of music — the "Let's Get It
15 On" deposit copy and the "Thinking Out Loud" sound recording.
16 The judge told you that. Dr. Ferrara spent literally hours
17 diverting your attention from the similarities between the two
18 songs by spending nearly all of his time discussing the
19 difference in the "Thinking Out Loud" sheet music, not the
20 sound recording, as is at issue in this case. So if their
21 expert gives a presentation that's based on the analysis of the
22 two pieces of music that the judge mentioned, feel free to give
23 it all the weight it deserves. However, that hasn't happened
24 here.

25 Now it would seem appalling that a defendant would be

N531GRI2

Summation - Ms. Rice

1 glaringly dishonest in representing information to you.

2 However, I would never go as far as to label their actions as
3 criminal. I'd simply argue that the defendants are hoping
4 you'd be blinded by their celebrity. You, and only you, are
5 going to decide whether one expert is more trustworthy than the
6 other. However, we hope that you'll also take into account
7 whether that expert has based their testimony on the actual
8 pieces of music at issue in this case — the "Let's Get It On"
9 deposit copy and the "Thinking Out Loud" sound recording.

10 While we're on the matter of witness credibility, the
11 plaintiffs feel very confident that you're going to take the
12 extraordinary use of language into consideration. If a witness
13 declares that there isn't a remote possibility of a particular
14 similarity, we know that you're going to apply your everyday
15 common sense. All of us know that if there was absolutely no
16 possibility of similarity of any kind, none of us would be
17 here. The Court, the parties, the attorneys, and especially
18 the experts have all gone through great lengths for over seven
19 years to present this case to you, the jury, to determine
20 whether or not these two songs are similar, and, if so, how
21 much. And you, the regular, ordinary person, gets to decide
22 whether or not they sound similar.

23 Now here's another reason why the plaintiffs are
24 confident that you will not be blinded by the defendant's
25 celebrity. At the beginning of this case, you all promised

N531GRI2

Summation - Ms. Rice

1 that you would follow the law as instructed by the judge. As I
2 mentioned earlier, the judge is going to give you jury
3 instructions, and that's the basic framework that you're going
4 to use to reach your verdict. And here are some of the
5 critical pieces of evidence that you're going to place within
6 that framework.

7 The plaintiffs have three elements that we have to
8 prove for our copyright claim — ownership of "Let's Get It
9 On," access, and copying. Your jury instructions will tell you
10 what kinds of evidence, what pieces of evidence that you should
11 look to in order to look at information that will be what's
12 called probative of copying, indicators of copying, indirect
13 evidence of copying. The reason that that is is because, like
14 I said earlier, there are just certain ways in which these
15 cases are presented. Rarely, if ever, are you going to have
16 one of the parties ever stand up and say, hi, I copied. That's
17 just not how it works. So the jury instructions will walk you
18 through what evidence you look at to determine what is
19 considered probative of copying.

20 Now first of all, the plaintiffs do have an ownership
21 in "Let's Get It On," to which the defendants have agreed. For
22 example, Sony has been paying the plaintiffs for years because
23 of their ownership of "Let's Get It On."

24 Next, the defendants, Mr. Sheeran and Ms. Wadge, have
25 both agreed that they had access to "Let's Get It On," meaning

N531GRI2

Summation - Ms. Rice

1 that they had both heard "Let's Get It On" before they wrote
2 "Thinking Out Loud." So our task has been to prove to you that
3 it's more likely than not that the defendants copied and/or
4 benefited from the copying of "Let's Get It On."

5 So in order to prove that "Thinking Out Loud" copies
6 "Let's Get It On," we needed to show you that unprotected
7 elements, as we discussed, of "Let's Get It On" have been
8 combined in a unique, original, or unusual way that makes them
9 protectable. The plaintiffs proved this with respect to three
10 distinct, unique melodies. We can call them A, B, and C.
11 They're the verse, the chorus, and the interlude. Through the
12 testimony of Dr. Stewart, we showed that these three unique
13 melodies in "Let's Get It On" were expressed in an original way
14 that not only makes them protectable but makes them protectable
15 against Mr. Sheeran as well.

16 In addition, the plaintiffs have argued that there are
17 sufficiently numerous — and, again, what does "numerous" mean?
18 You'll get instructions that will answer all of your questions,
19 but for the purposes of our conversation today, think of your
20 grade school definition. More than one. We're looking at
21 whether or not the plaintiffs have provided sufficiently
22 numerous, original, two or more maybe, unprotected elements to
23 warrant protection as a selection and arrangement. In fact,
24 the plaintiffs, we've identified three common elements. We
25 discussed the melodies with you; we discussed the chords, which

N531GRI2

Summation - Ms. Rice

1 we're sometimes calling the harmony; and we discussed the
2 harmonic rhythm. That's some of the issues we talked about
3 with the syncopation. We'll talk about that a little bit more.

4 So let's look at those common elements.

5 Dr. Stewart identified those three elements that show
6 evidence of copying. He identified the selection and
7 arrangement of the elements of melodies, harmonies, and
8 harmonic rhythm. So let's just go ahead and start with melody.

9 Dr. Stewart identified three virtually identical but
10 certainly original melodies — the verse, again, the chorus,
11 and that interlude.

12 I'm going to show you just a few of the slides that we
13 talked about this week with Dr. Stewart.

14 Thank you.

15 Now in slide 49, Dr. Stewart identified the first part
16 of the verse called 1A.

17 Do we have the ability to play sound on that?

18 (Audio played)

19 MS. RICE: Let's try that one more time.

20 (Audio played)

21 MS. RICE: That's the original deposit copy that the
22 judge said was at issue in this case — the deposit copy of
23 "Let's Get It On."

24 Next, Dr. Stewart identified the second part of the
25 verse, in slide 50.

N531GRI2

Summation - Ms. Rice

1 (Audio played)

2 MS. FARKAS: Your Honor, this slide was excluded by
3 your Honor and they're showing it to the jury anyway.

4 MS. RICE: Your Honor, I don't have that one as
5 excluded.

6 THE COURT: I'm told it was excluded.

7 MS. RICE: Your Honor, I did not have it on my list as
8 excluded. I'm happy to not refer to it at all.

9 THE COURT: Well, I don't think you should be playing
10 something that was excluded.

11 MS. RICE: I agree, your Honor.

12 THE COURT: And the person responsible for applying
13 whether it was excluded or not is you —

14 MS. RICE: Yes, your Honor.

15 THE COURT: — nobody else.

16 MS. RICE: Yes, your Honor, that's correct.

17 THE COURT: Well, take it away.

18 MS. RICE: Thank you, your Honor. My apologies to the
19 Court.

20 Next we're going to go to slide 67.

21 (Audio played)

22 MS. RICE: And if we could play the second example
23 once again, please.

24 (Audio played)

25 MS. RICE: Thank you.

N531GRI2

Summation - Ms. Rice

1 Now on that slide, Dr. Stewart showed you that once
2 again, the melodies were virtually identical, and once again,
3 we've been able to look at the corresponding pitch sequences
4 that allow you to see visually what you're actually hearing.

5 Finally, Dr. Stewart showed you the interlude in slide
6 72.

7 (Audio played)

8 MS. RICE: And if we could play both of those once
9 again.

10 (Audio played)

11 MS. RICE: Now in those slides, Dr. Stewart discusses
12 the interlude in which the melodies are substantially similar
13 in "Thinking Out Loud" and "Let's Get It On." Once again, he
14 showed you what you were hearing by the pitch sequences down at
15 the bottom where they are aligned. You'll note the alignment
16 in the red.

17 So then Dr. Stewart drew your attention to the
18 virtually identical chords in the first 24 seconds of "Thinking
19 Out Loud." Now Dr. Stewart demonstrated that, that
20 progression. First, Dr. Stewart drew your attention to the
21 fact that there was no D note played in the protected sound
22 recording of "Thinking Out Loud" during the first 24 seconds.

23 Interestingly, however, in one of the several attempts
24 to impress you and distract you from the issues in this case,
25 Mr. Sheeran claimed that Dr. Stewart was wrong and even played

N531GRI2

Summation - Ms. Rice

1 for you during his testimony to demonstrate that Dr. Stewart's
2 transcript testimony was incorrect, and in fact the D was not
3 present. When confronted with the fact that even his own
4 expert testified that the note was absent in the sound
5 recording of "Thinking Out Loud," Mr. Sheeran declared that
6 both musical experts, with decades of specialized training in
7 these matters, were wrong. Again, we will refer you to
8 Dr. Ferrara's testimony in which he describes the way that
9 these transcriptions are created the same way, using the same
10 program, for both experts.

11 Mr. Sheeran emphasized that despite his inability to
12 read music and his failure to remember which instruments were
13 present on his own sound recording, only he could be right,
14 however, about the transcriptions of the first 24 seconds. So
15 what would be his motivation to argue this point? Well, if
16 this one note is not present, then the chord progression goes
17 from virtually identical to identical.

18 So returning to the demonstration of the proof in our
19 case, Dr. Stewart demonstrated that the chord progressions in
20 both songs, even after the first 24 seconds, of "Thinking Out
21 Loud" were virtually identical, and as you can see in slide 26,
22 the chord progression in "Thinking Out Loud" is virtually
23 identical to "Let's Get It On."

24 And finally, with respect to — I'm sorry.

25 (Audio played)

N531GRI2

Summation - Ms. Rice

1 MS. RICE: Finally, with respect to the harmonic
2 rhythms, Dr. Stewart demonstrated that the anticipation of the
3 chords on the second and fourth beats is virtually identical.
4 Now this isn't simply because anticipation is present, but it's
5 also because of the unique combination of the element of
6 anticipation and the chord progression, while being paired with
7 virtually identical melodies in the verse, the chorus, and the
8 interlude.

9 Go to the next slide.

10 So in summary, Dr. Stewart identified a unique and
11 creative selection and arrangement of not just two but also
12 three common elements -- melody, harmony, and harmonic rhythm
13 — that, when combined in the manner in which Ed Townsend
14 uniquely combined them, created an original work that warranted
15 protection.

16 Finally, based on Dr. Stewart's analysis, he
17 determined that approximately 70 percent of "Thinking Out Loud"
18 came from "Let's Get It On."

19 So again, Mr. Sheeran argues that the plaintiffs claim
20 to own four chords, we own a common chord progression, or the
21 individual concept of anticipation. This has never, ever been
22 the plaintiff's claim. Their claim is simply that they own the
23 way in which these common elements were uniquely combined and
24 expressed within the copyright of "Let's Get It On." And
25 that's exactly why artists like Ed Townsend and Amy Wadge and

N531GRI2

Summation - Ms. Rice

1 Ed Sheeran copyright their music in the first place. In fact,
2 in his testimony, Mr. Sheeran even agreed that "Let's Get It
3 On" deserves copyright protection just like his work deserves
4 copyright protection in "Thinking Out Loud."

5 So I'm sure that when Ms. Farkas argued to you that
6 the plaintiffs claimed that they owned four chords, you were
7 stunned and automatically thought that the plaintiffs seemed a
8 little strange with that claim. Well, that's exactly what they
9 wanted you to think, so that you would discount our argument.
10 However, through the testimony of Dr. Stewart, we demonstrated
11 that our claim is much more realistic and specific than that.
12 Our claim is that "Thinking Out Loud" copies "Let's Get It On"
13 and that 70 percent of "Thinking Out Loud" is virtually
14 identical to "Let's Get It On."

15 Furthermore, we would additionally assert our claim
16 with respect to the selection and arrangement of the three
17 common elements of melody, harmony, and harmonic rhythm. In
18 fact, the plaintiffs again went on to identify three melodies
19 in "Thinking Out Loud" — the verse, the chorus, and the
20 interlude — that are virtually identical to those in "Let's
21 Get It On."

22 So the question on everybody's mind is whether or not
23 Mr. Sheeran independently created "Thinking Out Loud." As
24 Mr. Sheeran has said numerous times throughout this trial, only
25 he and Amy were there. We'll never know what truly happened

N531GRI2

Summation - Ms. Rice

1 when this song was created. But what we do know is that both
2 artists agreed that they had access to "Let's Get It On" and
3 that at a self-confessed writing pace of eight to ten songs per
4 day, it's more likely than not that they, intentionally or
5 unintentionally, copied "Let's Get It On." Even Mr. Sheeran
6 during his testimony admitted that it's possible he could have
7 subconsciously copied "Let's Get It On."

8 MR. SHEERAN: No, I didn't.

9 MS. RICE: He testified that at that writing rate, the
10 eight to ten songs per day, each song, containing about 300 to
11 600 words — and yes, we Googled the number of words of his
12 lyrics because he requested that we do that in his testimony —
13 it's a lot of lyrics to write each day. A lot. So the
14 additional question remains of how Mr. Sheeran, or anyone,
15 would be able to find time to write thoroughly vetted music
16 that doesn't infringe on the rights of others, especially when
17 he himself testified that he does not have a system in place to
18 ensure that copying does not take place, either for himself or
19 his collaborators.

20 So based on the 70 percent similarity testimony of
21 Dr. Stewart, Mr. Sheeran's own testimony of how many songs he
22 writes from scratch each day and the fact that at least
23 75 percent of his songs relies on the creativity and musical
24 influence of collaborators, it's highly unlikely that
25 Mr. Sheeran independently created "Thinking Out Loud."

N531GRI2

Summation - Ms. Rice

1 Now add those portions of his testimony and combine
2 them with the fact that he writes songs with lyrics discussing
3 things like hidden plagiarism. Remember those lyrics that we
4 talked about, the ones, "I'm not a rapper, I'm a singer with a
5 flow, I've got a habit of spitting quicker lyrics, you know,
6 you found me ripping the writtens out of pages they sit in, I
7 never want to get bitten 'cause plagiarism is hidden"? He
8 never explained those lyrics, and it would have been entirely
9 appropriate, entirely appropriate, when his attorneys examined
10 him, for him to do so. So besides challenging the listener,
11 there really aren't a whole lot of reasons to write about
12 plagiarism, not the least of which is the fact that it's pretty
13 difficult to find words that rhyme with the word "plagiarism."
14 But this is just simply another indicator that points to the
15 fact that it's more likely than not that Mr. Sheeran did not
16 independently create "Thinking Out Loud."

17 Furthermore, and most notably, Mr. Sheeran refused
18 over and over again during his testimony to simply state that
19 he independently created "Thinking Out Loud." In fact, he
20 didn't even know what independent creation was, and in his
21 frustration, he even challenged me to tell him what it was.
22 For the reasons that I've mentioned earlier, I tried to stay
23 away from giving legal definitions to jurors. And as much as
24 he attempted to try to convince you that independent creation
25 is some difficult, abstract, and theoretical legal concept,

N531GRI2

Summation - Ms. Rice

1 it's just not. Although only the judge can give you legal
2 definitions, I tried to give him examples so that you, the
3 jury, could see it wasn't a trick question. He didn't want to
4 answer a simple yes or no question. However, when you're under
5 oath, you can't answer that you independently created something
6 if you did not. Please remember that in your deliberations.

7 We are confident that you will see that his question
8 to me in his testimony wasn't only a question of whether or not
9 he'd play a copied song in public but whether or not you will
10 hold him accountable for copying it. Mr. Sheeran personally
11 challenged you, the jurors, by stating that he'd have to be
12 stupid to play the song in front of thousands of people.
13 However, this is, again, another attempt to mislead you.
14 "Thinking Out Loud" was released in September of 2014. The
15 performance detailed in that Zurich video that we showed you
16 was taken in November of 2014. Mr. Sheeran felt comfortable
17 playing the song that he had copied because he didn't think
18 that anyone had noticed yet. Much of the negative feedback
19 that he received did not occur until the Zurich video was
20 taken, which was shortly after the release. Remember, that
21 time period is September 2014 to November 2014.

22 It's more transparent that he played a song that not
23 only did he think that people wouldn't notice that he copied
24 but may be okay. Unfortunately, he was wrong. People noticed
25 fairly quickly. And you heard from his manager, Stuart Camp,

N531GRI2

Summation - Ms. Rice

1 that people on the internet began talking about the
2 similarities very openly.

3 So let's talk about some of the additional mashups
4 that Mr. Sheeran has introduced to all of us during this trial.

5 The additional mashups that he discusses were recorded
6 after the claim was made against Mr. Sheeran. In addition to
7 mashups that Mr. Sheeran says define a significant portion of
8 his performances and/or his successes are in fact not the same
9 kind of performance as the performance shown in the Zurich
10 video. The other songs are not identically inserted in the
11 exact same way, the same melodies, the same harmonies and
12 harmonic rhythms, in the way that "Let's Get It On" is inserted
13 into "Thinking Out Loud." And if you notice, not a single of
14 the melodies in the mashups that Mr. Sheeran played in court
15 matched any of the melodies in the virtually identical way that
16 the melodies in "Thinking Out Loud" and "Let's Get It On"
17 aligned.

18 Additionally, Mr. Sheeran made significant
19 representations with his comparisons to Van Morrison that we
20 spent over an hour discussing with Dr. Ferrara. Although he
21 plays them together, it's difficult, even when you're
22 listening, to believe that a three-chord progression in the Van
23 Morrison songs, "Thinking Out Loud" in any way fits over the
24 four-chord progression in the way that he says it does, and it
25 goes to show that just because you say something fits because

N531GRI2

Summation - Ms. Rice

1 you forced it, doesn't mean it fits.

2 As an interesting note, in his testimony Mr. Sheeran
3 referred to the way that "Shape of You" and "No Scrubs" relate
4 to each other when he performs them together, as an
5 interpolation. He specifically used that word. And then he
6 describes the rest of the combinations of songs as mashups.
7 And he's correct. And for someone who testified that he had no
8 idea what the differences were between an interpolation and a
9 simple mashup, those are very technical descriptions. He
10 claimed, quote, he was not a musicologist, but he seemed to get
11 really lucky when accurately describing the relationship
12 between "Shape of You" and "No Scrubs" as an interpolation.
13 It's clear that he — he particularly knows the difference, and
14 he's completely aware that the Zurich video specifically
15 highlights the special, virtually identical relationship
16 between "Let's Get It On" and "Thinking Out Loud." The other
17 mashups are simple medleys reminiscent of that Axis of Awesome
18 video which we all got to watch, which we all have seen and
19 know and love.

20 The Zurich video is further evidence that Mr. Sheeran
21 knew exactly what he was doing when he specifically chose to
22 play those songs together. As the judge mentioned at the
23 beginning of our case, this case is about two pieces of music
24 — the "Let's Get It On" deposit copy and the "Thinking Out
25 Loud" commercial sound recording, not the "Thinking Out Loud"

N531GRI2

Summation - Ms. Rice

1 sheet music, as Dr. Ferrara would like for you to believe.
2 They've attempted to misdirect your attention to differences in
3 notation, such as the placement of a note or chord that's
4 written differently, but let me be clear. We're referring
5 particularly to "Thinking Out Loud" sheet music. Those
6 differences do not matter at all, because the sheet music is
7 not at issue in this case. They're not relevant to any of our
8 discussions. So the only differences — or, in our case,
9 similarities — that you need to evaluate during your
10 deliberations are those between the "Let's Get It On" deposit
11 copy and the "Thinking Out Loud" sound recording.

12 Ms. Farkas mentioned something about creativity that
13 the plaintiffs really want you to take to heart. No one here
14 wants to damage creativity. No one does. The plaintiffs
15 simply want to discourage theft. That's the difference. We
16 simply believe that credit should be given where credit is due.

17 The last thing that I'll say is about Dr. Stewart.
18 Remarks were made that Dr. Stewart made disparaging remarks
19 about one of the prior art songs that both he and Dr. Ferrara
20 evaluated for the particular — for the purposes of this case.
21 And as you know, Dr. Ferrara spent his time during his
22 Fulbright scholarship doing work evaluating music in Mexico and
23 found that statement particularly offensive, and so do we.

24 Finally, there's the issue of what's protectable and
25 what's not, what's copyrightable, what's not. Again, those

N531GRI2

Summation - Mr. Crump

1 kinds of definitions will be given to you, so that you can use
2 them in the way that you need to. However, one comparison was
3 made that letters aren't protectable. That's true. The
4 alphabet is not protectable. Novels, however, are. It's the
5 combination of letters. In order for you to believe their
6 arguments, you have to leave your common sense at the door.
7 And we don't want you to do that. We want you to bring your
8 common sense into your deliberations and look at the
9 significant not only quantity but quality of the evidence that
10 we presented that Mr. Sheeran more likely than not did not
11 independently create "Thinking Out Loud" so that when you get
12 your jury verdict form, you answer yes or no to the question of
13 independent creation based on the information on the verdict
14 form, using that standard, and then you can easily go through
15 the rest of the questions.

16 Thank you so much for your time. This is a difficult
17 bit of information to get ahold of if you don't have musical
18 training or if you have just simple — a simple enjoyment.
19 It's a lot. And we just really appreciate your patience.
20 Thank you so much.

21 THE COURT: Thank you, Ms. Rice.

22 Members of the jury, Mr. Crump asked if he could make
23 some closing remarks. I'm not in the habit of giving one side
24 two closing statements and the other only one, and so I'm sure
25 he'll keep it brief, but I said he could do that.

N531GRI2

Summation - Mr. Crump

1 MR. CRUMP: Thank you, your Honor.

2 And we have the burden, so I'm giving the closing
3 remarks to simply remind you all of what we said in the very
4 beginning. If you remember nothing else about all the
5 testimony you've heard all of the experts for plaintiff or
6 defendant said, please remember this case is about giving
7 credit where credit is due. And even Amy Wadge, the co-writer
8 of "Thinking Out Loud," agrees with that. When she was at the
9 witness stand and she said that, you know, Mr. Sheeran saw that
10 he copied her work, subconsciously, he went back and gave her a
11 percentage because she agreed it was only right that writers
12 get credit where credit is due.

13 We said that we had a smoking gun. And that smoking
14 gun was the Zurich video. You know, my grandmother taught me,
15 when I was a little boy, she said, *Your actions speak so loud*
16 *that I don't need to hear your words.* And so when you look at
17 that Zurich video, those are the actions telling us what
18 Mr. Sheeran thought was similar to his song "Thinking Out Loud"
19 when he went from "Thinking Out Loud" to "Let's Get It On,"
20 back to "Thinking Out Loud."

21 I know there's been a lot made about Van Morrison
22 being a great inspiration, "Crazy Love." Where is that video?
23 Where is that video of him performing that? Because actions
24 speak louder than words. Not only did we have a smoking gun
25 but we have bullets for that smoking gun, in the fact of his

N531GRI2

Summation - Mr. Crump

1 own lyrics. He said he writes from his heart, that his lyrics
2 are an expression of his heart. And you heard about his
3 writing on the same album of "Thinking Out Loud" about
4 plagiarism. And so you're looking at plagiarism here, same
5 album, and then you look at —

6 MS. FARKAS: Your Honor, I'd just like to note that
7 these lyrics are not in evidence. In fact, Ms. Rice abandoned
8 this line of questioning with Mr. Sheeran.

9 MR. CRUMP: Judge — your Honor, not only —

10 THE COURT: Stay within the evidence, Mr. Crump.

11 MR. CRUMP: Yes, sir, your Honor. When they were
12 doing the mashups, they also played that song, the jury may
13 recall.

14 THE COURT: Stay within the evidence as compared to
15 grand principles.

16 MR. CRUMP: Yes, sir, your Honor.

17 And then you also heard Mr. Frank questioning his
18 producer, Jake Gosling — I'm sorry. You heard Mr. Frank
19 questioning Ed Sheeran about the declaration of Jake Gosling
20 and about the bass guitar, was it real or computerized bass,
21 and you heard that Mr. Gosling said, in his declaration, said
22 it was real. Mr. Sheeran mistakenly thought it was bass.
23 Those are things for you all to consider.

24 And you heard Mr. Sheeran say if you rule in favor of
25 the plaintiffs, then he's done with music. That's simply a

N531GRI2

Summation - Mr. Crump

1 threat to try to play on your emotions. I promise you, no
2 matter what your verdict is, he won't be done with music. He
3 will continue to have an illustrious career.

4 You heard about them calling our expert a criminal.
5 They talked about it's absurd that we bring these claims,
6 Ms. Kathryn Townsend. It may be absurd for plaintiffs to bring
7 this claim, but yet people all over the internet are talking
8 about the same thing. You heard briefly his manager —

9 MS. FARKAS: Objection, your Honor. Let's stick to
10 the evidence in the record and not Mr. Crump's view of the
11 world, not to mention hearsay. But it's not evidence in the
12 record, and for good reason.

13 THE COURT: Ms. Townsend testified.

14 MR. CRUMP: Thank you, your Honor.

15 And so when the facts are not in your favor, as my
16 grandma taught me, you resort to name calling, insults, and
17 threats. We saw it all here.

18 But Ms. Townsend is just trying to honor the promise
19 she made to her father as he was going into transition. She
20 said, *I promise I will protect your intellectual properties and*
21 *your legacy*, and that's exactly what she was trying to do.

22 And I will quickly just state to you, you're going to
23 hear from the judge's instructions that it is substantial
24 similarities. It is not virtually identical. Substantial
25 similarities, you will hear from the instructions from the

N531GRI2

Summation - Mr. Crump

1 judge. And so you apply your common sense — that's all we're
2 asking — your sense; your sense of what you saw, your sense of
3 what you heard, and, most importantly, your common sense.

4 And let's be clear. "Thinking Out Loud," the issues
5 in this case are not about the lyrics. There couldn't be more
6 different lyrics when you think about the two songs. It is the
7 music. It is the melody. So, you know, the defense efforts to
8 pull on your heartstrings about how the song was written and
9 why it was written is wholly irrelevant. This is about the
10 music, the melodies, the harmonies, the chord progressions,
11 those things that we've been talking about, that the experts
12 have been talking about. And don't let — be charmed by
13 Mr. Sheeran. He is a performer. And I'm sure if Mr. Townsend
14 was alive and was in this court, he would have talked to you
15 about how he wrote, read, and performed music too, and he would
16 have been just as charming.

17 Ladies and gentlemen, it is somewhat preposterous to
18 say that the fate of the music industry lies on your decision.
19 It does not. There have been other noteworthy people — you
20 heard the experts talk about the Led Zeppelin case and the
21 George Harrison case. They had copyright lawsuits, but they
22 went through it, and the music industry was just fine.
23 Mr. Sheeran's career is going to be just fine. Don't let them
24 play on your emotions like that.

25 And what you heard, you know, Dr. Ferrara, he — you

N531GRI2

Summation - Mr. Crump

1 heard Dr. Ferrara attempt to create similarities between
2 "Thinking Out Loud" and other various songs by playing
3 renditions on the piano that simply do not sound like "Thinking
4 Out Loud" or "Let's Get It On." Let's listen for ourselves for
5 a second. He talked about "Do You Love Me" had the same chord
6 progressions and the melodies.

7 Can you play "Do You Love Me."

8 "Do You Love Me" by The Contours that he testified to
9 this morning, your Honor.

10 MS. FARKAS: The song is not in evidence, your Honor,
11 the recording, presumably, that they're about to play.

12 THE COURT: I think you're pretty well at the end of
13 your requested time, Mr. Crump.

14 MR. CRUMP: Okay. I will wrap up then.

15 "Do You Love Me," "Fine Fine Fine," "Georgy Girl,"
16 y'all know how those songs sound. They sound nothing like
17 "Let's Get It On" nor "Thinking Out Loud."

18 And ladies and gentlemen, just know that you all can
19 understand that the Copyright Office encourages music creators,
20 that they're inventors of the music industry, and contrary to
21 what the defense would have you believe, copyright law does not
22 kill creativity; it encourages innovation and promotes giving
23 credit where credit is due.

24 You can have confidence in your verdict. Each one of
25 you have a vote, and don't take that vote lightly. You all are

N531GRI2

Summation - Mr. Crump

1 going to have some conversations about what evidence is more
2 important than the other, but if you have the abiding
3 conviction that Ed Townsend deserves to get credit whether
4 Mr. Sheeran consciously or subconsciously copied it, then stand
5 your ground as you deliberate, and just make sure you say, I'm
6 — I have a vote, and this is an important vote, and I'm not
7 just going to give in my vote for a matter of convenience.
8 It's going to be some compromise, give-and-take. That's what
9 always happens with juries. You say, no, I want to make sure
10 that Mr. Townsend gets his credit where credit is due, and if
11 we can't agree, we can't agree, but don't give in on your vote
12 just because others think differently. You have your right.
13 That's what makes America great, and that's why we are here.
14 We are here because you are the judge of facts. You are the
15 judge of this case. The judge is the judge of law, you are the
16 judge of facts. So as you deliberate, make sure that you make
17 your vote count, and if you can't agree, you say, I can't
18 agree. My vote is my vote. That's what the system will
19 require you to do, to vote your conscience, and apply your
20 common sense. That is the most important thing.

21 These songs sound substantially similar. That's why
22 we're here in this courtroom today. Thank you.

23 THE COURT: Anybody want to recess? One vote carries
24 in this, and we have two, three. We'll take seven minutes.

25 (Recess)

N53HGri3

(Jury not present)

THE COURT: Those who have received a copy of my charge will notice that I omit certain sections in the beginning sections of generalities, and I do that in order that the lawyers, who need their time, still leave the jury time to deliberate. They're just timesaving omissions. They don't deal with the substance of the case.

Let's have the jury in.

(Jury present)

THE COURT: Now that you've heard all of the evidence, it is my duty to give you instructions about the law under which you should evaluate the evidence which has been admitted into the record in this case.

It is your duty as jurors to follow the law as stated in these instructions and to apply these rules of law to the facts as you find them from the evidence in the case. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty as jurors to base a verdict on any other view of the law than that given in these instructions — I thought I might be too loud. OK — just as it would be a violation of your sworn duty as judges of the facts to base a verdict on anything other than the evidence in the case.

Can you all hear me? It's nice if everybody can, but it's essential. If anyone has stated a legal principle

N53HGri3

1 different from that that I state in my instructions, it's my
2 instructions that you must follow.

3 Nothing that I say in these instructions and no ruling
4 I made during the trial, nor anything I may have said or done
5 during the trial, is to be taken as an indication that I have
6 any view about the facts in this case. It's not my function to
7 determine the facts, but yours.

8 You have been chosen and sworn as jurors in this case
9 to try the issues of fact. You are to perform your duty
10 without bias or prejudice as to any party. Our system of law
11 does not permit jurors to be governed by sympathy or prejudice
12 or public opinion. Both the parties and the public expect that
13 you will carefully and impartially consider all of the
14 evidence, follow the law as stated by the Court, and reach a
15 just verdict regardless of the consequences to any party.

16 What the lawyers said in their opening and closing
17 statements is not evidence. Questions, objections, or
18 arguments are not evidence, and you should not draw any
19 conclusions from them.

20 You are permitted to draw from the facts in the case
21 which you find to have been proven such reasonable inferences
22 about other facts as seem justified in the light of your
23 experience. An inference is not a speculation, and it's not a
24 guess. It's a reasoned, logical deduction based on the proof
25 as to some fact that some other fact did or did not exist.

N53HGri3

1 You are the sole judges of the facts, and you alone
2 decide what weight, if any, to give to each piece of evidence.
3 You must determine which of the witnesses you believe, what
4 portion of their testimony you accept, and what weight you
5 attach to it. In your everyday affairs, you determine for
6 yourselves the reliability or unreliability of statements made
7 to you by others. The same tests that you use in your everyday
8 dealings are the tests that you apply in your deliberations.
9 The interest, or lack of interest, of any witness in the
10 outcome of the case; the bias or prejudice of the witness, if
11 there be any; the appearance, the manner in which the witness
12 gives his or her testimony on the stand; the opportunity that
13 the witness had to observe the facts concerning which he
14 testified; the probability or improbability of the witness'
15 testimony when viewed in the light of all the other evidence in
16 the case — these are all items to be taken into your
17 consideration in determining the weight, if any, that you will
18 give to that witness' testimony.

19 You've heard testimony from experts. An expert's
20 testimony is offered only to assist you. You may accept it or
21 reject it, in part or in full. If you find that the opinion of
22 an expert witness is not based upon sufficient education and
23 experience, or if you should conclude that the reasons given in
24 support of the opinion are not sound or outweighed by other
25 testimony — other evidence, you may disregard the opinion

N53HGri3

1 entirely or accept those portions which you find it merits.

2 The party with the burden of proof on an issue must
3 prove its assertions by a preponderance of the evidence. To
4 establish a fact by the preponderance of the evidence means to
5 prove that it is more likely true than not true. This is an
6 evaluation of the quality of the evidence, not the quantity of
7 witnesses or documents.

8 This working OK?

9 If, after hearing all of the evidence, you believe
10 that a fact is more likely true than not true, then that fact
11 has been proved to you by a preponderance of the evidence. If
12 you believe it more likely not true or did not occur, it has
13 not been proven. And if you find the likelihood evenly
14 balanced, maybe yes, maybe no, the party having the burden of
15 proving that fact to you has not succeeded.

16 Ms. Townsend has the burden of proving by a
17 preponderance of the evidence that Sheeran's song "Thinking Out
18 Loud" infringes "Let's Get it On." Sheeran has the burden of
19 proving by a preponderance of the evidence that he
20 independently created "Thinking Out Loud."

21 When determining whether "Let's Get it On" was copied,
22 you consider only the sheet music in the song. That's because
23 Ed Townsend applied for a copyright registration of "Let's Get
24 it On," and he filed only the sheet music. This became known
25 as the deposit copy, and anything that is not in the deposit

N53HGri3

1 copy is not protected. The sound recording by Marvin Gaye we
2 mentioned occasionally is not protected, and there's no claim
3 here that it is being infringed.

4 The deposit copy is comprised of elements that may be
5 protected or unprotected. An element is not protected just
6 because it's in the deposit copy. If the deposit copy contains
7 elements that are commonplace, then the element is not
8 protected even though the rest of the work may be. That's an
9 important principle, and it goes all the way through this case.

10 To hold Sheeran liable for copyright infringement,
11 Townsend must prove by a preponderance of the evidence that
12 Sheeran actually copied and wrongfully copied "Let's Get it
13 On." If you find that Townsend doesn't establish either by a
14 preponderance of the evidence, then you must find in favor of
15 Sheeran that he did not infringe the copyright of "Let's Get it
16 On."

17 To prove infringement of the copyright of "Let's Get
18 it On," Townsend must show by a preponderance of the evidence
19 that the similarities between the works arise from actual
20 copying and not mere coincidence.

21 Townsend can establish actual copying circumstantially
22 through indirect evidence by demonstrating that Sheeran had
23 access to "Let's Get it On" and that the similarities between
24 the songs are probative of copying.

25 The parties have agreed that Sheeran was aware of

N53HGri3

1 "Let's Get it On" prior to creating "Thinking Out Loud," so
2 therefore you don't have to decide the issue of access.

3 If you decide that the similarities between "Let's Get
4 it On" and "Thinking Out Loud" are such that the independent
5 creation of "Thinking Out Loud" is unlikely, then the
6 similarities are probative of copying. The similarities
7 between the works can relate to any element and do not need to
8 be substantial. Townsend only needs to show that "Thinking Out
9 Loud" draws from "Let's Get it On," and similarities can be
10 shown by expert testimony.

11 If you find that Townsend has failed to prove by a
12 preponderance of the evidence that Sheeran actually copied
13 "Let's Get it On" when creating "Thinking Out Loud," then you
14 must find that Sheeran did not infringe the copyright of "Let's
15 Get it On."

16 If you find that Townsend has shown actual copying,
17 then Sheeran may prove — challenge that by proving to you by a
18 preponderance of the evidence that he independently created
19 "Thinking Out Loud."

20 Independent creation is a complete defense to
21 copyright infringement. If Sheeran independently created
22 "Thinking Out Loud," there is no copyright infringement no
23 matter how similar that song is to "Let's Get it On."

24 "Thinking Out Loud" was independently created if it was made
25 without reference to "Let's Get it On" or if it was based on

N53HGri3

1 works already in the public domain. If Sheeran even
2 subconsciously or innocently relied on "Let's Get it On," then
3 he did not independently create "Thinking Out Loud," but that
4 must be shown by facts, not merely guess or suspicion.

5 If Sheeran persuades you by a preponderance of the
6 evidence that he independently created "Thinking Out Loud,"
7 then you must find there is no copyright infringement no matter
8 how similar the songs are.

9 But if you find that Sheeran did not meet that burden,
10 that does not mean that he infringed the copyright of "Let's
11 Get it On." Townsend must still show by a preponderance of the
12 evidence Sheeran's actual copying of "Let's Get it On" was
13 wrongful.

14 Wrongful copying is distinct from actual copying. Not
15 all actual copying constitutes wrongful copying, because
16 copying unprotected aspects of a work is not wrongful.

17 You'll have a copy of this in the — listen anyway.

18 Wrongful copying has occurred if you find that
19 Townsend has shown by a preponderance of the evidence that
20 there's a substantial similarity between the protected elements
21 of "Let's Get it On" and "Thinking Out Loud." When deciding,
22 you cannot rely on any expert opinion that the alleged copying
23 is wrongful. That is for you to determine.

24 Townsend argues that portions of the melody identified
25 by her as Melody A, Melody B, and Melody C, and the selection

N53HGri3

1 and arrangement of certain unprotected elements in "Let's Get
2 it On" are protected.

3 An element is protected if it is an original work of
4 the author. An element is original if it was independently
5 created by the author and has a minimal degree of creativity.
6 The requisite degree of creativity is extremely low. Even a
7 slight amount will suffice.

8 To be protected, Townsend must show by a preponderance
9 of the evidence that the alleged Melody A, Melody B, and Melody
10 C each constitute an original pitch sequence that is
11 rhythmically organized in a coherent fashion so as to form an
12 aesthetic whole and that the sequence consists of more than a
13 few pitches — a few notes. If you find that the alleged
14 Melody A, B, or C are only a sequence of pitches, then it's not
15 a melody and cannot be protected.

16 An element is not protected if it is commonplace or
17 part of the public domain. "Let's Get it On's" chord
18 progression, harmonic rhythm, which is also called the
19 anticipation, and short pitch sequences in Melodies A, B, and C
20 are all commonplace and may be used individually by anyone,
21 including Townsend or Sheeran.

22 However, a combination of numerous unprotected
23 elements is protectable if the author has selected and
24 coordinated and arranged the numerous elements in an original
25 way. This selection and arrangement copyright protects the

N53HGri3

1 particular way in which the arrangement of numerous elements
2 form a coherent pattern, synthesis, or design, rather than the
3 underlying elements themselves.

4 You must decide whether Townsend has shown by a
5 preponderance of the evidence that the chord progression and
6 harmonic rhythm constitute numerous elements which are selected
7 and arranged in an original way such that they warrant
8 protection, deserve protection. If you have previously found
9 that Melodies A, B, and C are not protected, then the
10 combination you must evaluate includes their pitch sequences
11 along with the chord progression and the harmonic rhythm.

12 If Townsend fails to show by a preponderance of the
13 evidence that either the melodies themselves or the selection
14 and arrangement of the chord progressions, harmonic rhythm, and
15 possibly the pitch sequence in Melodies A, B, and C are
16 protectable, and if she fails to show that, then you must —
17 you must find that Sheeran is not liable.

18 If Townsend has shown that either are protected, then
19 the next question is whether Townsend has shown by a
20 preponderance of the evidence that "Thinking Out Loud" is
21 substantially similar to those protected elements of "Let's Get
22 it On," because individually protected elements like A, B, and
23 C, if you find them protectable, and the combination of the
24 unprotected elements if you find the elements are numerous and
25 selected in an original way.

N53HGri3

1 You will meet those considerations again in the form
2 of a jury verdict prepared for you which helps you order your
3 way through the considerations.

4 Substantial means the amount that was copied is more
5 than minimal. If you find that only the selection and
6 arrangement of the combination of the uncopyrighted elements I
7 just mentioned of "Let's Get it On" is protected, then
8 substantial similarity requires a showing of very close
9 copying. In determining whether the similarities are
10 substantial, consider whether the similarities relate to a
11 substantial portion of "Let's Get it On," not whether such
12 material is a substantial portion of "Thinking Out Loud,"
13 because "Let's Get it On" is the victim.

14 If you find that Townsend has shown by a preponderance
15 of the evidence that the protected elements of the two songs
16 are substantially similar, you must find Sheeran liable.

17 If Townsend has not shown by a preponderance of the
18 evidence that the protected elements are substantially similar,
19 then you must find Sheeran not liable.

20 In reaching your verdict, you are not to be affected
21 by sympathy for any of the parties or to be affected by the —
22 what the reaction of the parties to your verdict may be. You
23 should consider only the evidence presented, finding the facts
24 from what you consider to be believable evidence, and apply to
25 those facts the law as I have given you in these instructions.

N53HGri3

1 Your verdict will be determined by your conclusions you reach
2 in that manner regardless of whom the verdict helps or hurts.

3 What the verdict should be is the exclusive duty and
4 responsibility of the jury. The verdict must represent the
5 considered judgment of each juror. In order to return a
6 verdict, it's necessary that each juror must agree. Your
7 verdict must be unanimous. It is your duty as jurors to
8 consult with one another and to deliberate with a view toward
9 reaching an agreement if you can do so without violating your
10 individual judgment. You must each decide the case for
11 yourselves, but only after an impartial consideration of the
12 evidence with your fellow jurors.

13 In the course of your deliberations, don't hesitate to
14 reexamine your views, your own views, and change your opinion
15 if you are convinced it was wrong, but don't surrender an
16 honest conviction as to the weight or effect of evidence only
17 because of the opinion of your fellow jurors. Remember at all
18 times you're not partisans, you are judges, judges of the
19 facts. Your only interest is to seek the truth from the
20 evidence in the case.

21 Because Jesse Brown is sitting in seat No. 1 in the
22 jury box, he will be your foreman. The foreman will preside
23 over your deliberations and may be your spokesperson here in
24 court. That's simply for convenience, and it gives him no
25 greater authority, and his vote has no greater weight than that

N53HGri3

1 of any other juror.

2 If it becomes necessary in your deliberations to
3 communicate with the Court, you may send a note, signed by your
4 foreperson or by one or more members of the jury. No member of
5 the jury should ever attempt to communicate with the Court by
6 any means other than a signed writing, and the Court will never
7 communicate with any member of the jury on any subject touching
8 on the merits of the case otherwise than in writing or orally
9 here in open court.

10 You will note from the oath about to be taken by the
11 marshal that he, as well as you, is forbidden to communicate
12 with any member of the jury on any subject touching on the
13 merits of the case.

14 Bear in mind that you are never to reveal to any
15 person, not even to the Court, how the jury stands, numerically
16 or otherwise, on any of the questions before you until after
17 you have rendered a unanimous verdict, which you may now retire
18 and consider.

19 THE DEPUTY CLERK: Will the marshal please step
20 forward.

21 THE COURT: Now you'll be given a form of verdict, and
22 it consists of seven, I think, questions which are written with
23 great particularity. They're intertwined to make each one
24 clear and to sort out, as you go through it, the different
25 considerations that I've just explained to you. Read it

N53HGri3

1 carefully, follow each instruction mechanically, and it will
2 all turn out all right. But don't just go at it, because it
3 will be a terrible mess.

4 Thank you.

5 THE DEPUTY CLERK: Will the marshal please step
6 forward.

7 (Marshal sworn)

8 (At 5:04 p.m., the jury retired to deliberate)

9 (Jury not present)

10 THE COURT: It's good for them to get a little
11 deliberation before they go home. It gets a — it ties them
12 together as a unit and makes them more looking forward to
13 returning tomorrow morning.

14 In the meantime, anybody who wants to leave is free to
15 leave as long as we can get in touch with them quickly if we
16 have some communication from the jury. So tell Mr. Lee, who's
17 easy to find, where he can — there — where he can reach you
18 on short notice and be available on short notice if it's
19 required, and in that way you can — you don't have to be in
20 this room.

21 We're not going to spend the night waiting for them,
22 but when you get impatient enough, tell me, and we'll think
23 about going home.

24 Counsel. Counsel, one each or so.

25 (Recess pending verdict)

N53HGri3

1 (At 5:12 p.m., jury note)

2 (Jury present)

3 THE COURT: Members of the jury, I have your note
4 saying, "We'd like to go home for the evening. Can we go?"
5 And the answer is yes, but I have one or two things I should
6 tell you first.

7 Oh, and they wanted to — I'm told you want to start
8 at 10:30 tomorrow. Is that a common desire?

9 JUROR: Yes.

10 THE COURT: It's up to — I'll tell you, it's up to
11 you, but the reason I ask is because of a few — if a few
12 members come, don't begin talking about the case until all of
13 you are there, because every member should be partaking —

14 (Discussion off the record)

15 THE COURT: Oh, somebody else was asking about 10:30.
16 That's not you. But we ought to set a time before you leave
17 that's convenient for each of you, and 10:30 would be fine.
18 11:00 is fine. But don't discuss the case till you're all
19 there.

20 The other thing is when you're going back and coming
21 in, it's very tempting if you're in the elevator with somebody,
22 another juror, to say something about the case. Stay away from
23 it. Don't — from then on you're in a different being, and
24 when you resume all together, then discuss the case, and
25 everybody hears.

N53HGri3

1 Trying to think of whether there's anything else that
2 — usually, as you know, I tell you to keep an open mind and
3 not discuss the case. That's probably still good advice. You
4 may form opinions and reject them and change your mind as the
5 process goes, and that's much easier to do if you haven't
6 discussed it with anybody else in the meantime. So even though
7 you're deliberating, save the deliberations for when you're all
8 together and keep well and return.

9 When do you want to come back in the morning? 10:00?

10 JUROR: 10:00 works for me.

11 THE COURT: Hmm?

12 JUROR: 10 o'clock.

13 THE COURT: 10 o'clock. OK. I'll tell you that I
14 will probably not be here until 10:30, so if you reach a
15 verdict, nothing will happen. But I'll be here from then on.

16 Have a good evening.

17 (Jury excused)

18 (Recess pending verdict)

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21
22
23
24
25

INDEX OF EXAMINATION

Examination of:	Page
LAWRENCE FERRARA Ph.D.	
Cross By Mr. Frank	804
Redirect By Ms. Farkas	843